

*United States Court of Appeals  
for the Second Circuit*



**APPENDIX**



**75-7435**

RECEIVED  
U.S. COURT OF APPEALS  
OCT 1 1975

In The

**United States Court of Appeals**

For The Second Circuit

MURRAY GLADSTONE,

*Plaintiff-Appellant,*

v.s.

B  
GS

FIREMAN'S FUND INSURANCE COMPANY,

*Defendant-Appellee.*

*Appeal from the United States District Court for the Southern  
District of New York*

---

**APPELLANT'S APPENDIX**

---

LEO M. LAURANCE  
*Attorney for Plaintiff-Appellant*  
299 Broadway  
New York, New York 10007  
(212) CO 7-7426



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## CIVIL DOCKET

UNITED STATES DISTRICT COURT

## DOCKET ENTRIES

6/5/72 by plff.

Jury demand date:

JUDGE DUFFY

32 Civ. 1894

JUDGE DUFFY

TITLE OF CASE

BREK GLADSTONE

A. J. DUFFY

AGAINST,

PENTUS FUND INSURANCE COMPANY,

ATTORNEYS

For plaintiff:

E. O. M. LAURANCE

299 Broadway,  
N.Y.C.N.Y. 10007

For defendant:

BIGHAM ENGLAR JONES & HOUSTON  
99 John St-NYC 10038 (732-4646)

## STATISTICAL RECORD

## COSTS

## NAME OR RECEIPT NO.

## REC.

## DISB.

J.S. 5 mailed X

Clerk

6/5/72 Brown E.  
6/9/72 usm

NJ

P

I.M. 6 mailed ✓

Marshal

Preliminary action

Docket fee

PENTUS FUND INSURANCE POLICY.

+ \$6,000.00

Witness fees

Action docketed

Depositions

A

## Docket Entries

B  
72 CIV. 72

DATE	PROCEEDINGS	Date Judge
cb 25/72	Filed Petition for removal fro m Supreme Ct. of the State of N.Y. County of N.Y. to U.S. District Court for the Southern District of N.Y.	
6 25/72	Filed Notice of Removal.	
6/25/72	FILED UNDERTAKING ON REMOVAL, \$500.00 NATIONAL SURETY CORP.	
7-72	Filed Pltffs. Notice of deposition pursuant to ruel 30.FRCP	
n 5/72	Filed Pltffs. demand for jury.	
n 13/72	Filed Dft. Notice of Motion. Re: Vacate Jury Demand. ret. 6/27/72.	
n 13.72	Filed Dfts. Memorandum of law in support of dft's motion to vacate	
28-72	pltf's demand for jury trial.	
28-72	Filed MEMO-END. on motion papers filed 6/13/72. Motion consented to. SETTLE ORDER ON NOTICE. Brieant, J.	
18-72	Filed order that motion Re: vacating the demand for jury trial, is granted in all respects. (m/n) BRIEANT, J.	
12-72	Filed deft's notice to take deposition of pltf on 9-26-72.	
15-72	Filed deft's interrog. to pltf.	
6-73	Filed supplemental interrogatories propounded to pltf.	
p 7-73	Filed deft's notice of motion, Re: dismiss action, ret before Duffy J. on 9/18/73	
pt 14-73	Filed pltf's affdt. in opposition to motion.	
L 12-73	PRE-TRIAL CONFERENCE HELD. DUFFY, J.	
S-4-74	PRE-TRIAL CONFERENCE HELD. JACOBS V. S. Mag.	
n 20-74	Filed report of Magistrate Jacobs.	
n 20-74	Filed memo endorsed on Mag. Jacobs' report filed 3-20-74. The attached report of the Magistrate is hereby confirmed. So ordered. DUFFY, J. (m/n)	
March 20-74	Filed pltf's further answer to supplemental interrogs.	
III-74	Pre-trial conference held- DUFFY, J.	
10-75	Filed deft's notice of taking depositions of Murray Pearl and Louis Frey on 1-22-75	
• 28-75	Filed deft's notice to admit facts.	
ch 3-75	Filed deft's notice to produce.	
ch 10-75	Filed deft's notice for leave to amend its answer as indicated prior to the trial.	
ch 7-75	Pre-trial conference held by DUFFY, J.	
n 12-75	Filed Amended ANSWER of deft. to the complaint	
19-75	<i>Case reassigned to Judge Werker 12/11</i>	BEN
26-75		
02-75	Filed order directing answers to certain depositions. The depositions as directed are to be completed within 2 weeks from the date hereof, and counsel are to report to the court when they are completed. - So ordered. Werker, J. m/n	
0-75	Filed deposition of plaintiff taken on 5-9-74 m/n	
0-75	Filed deposition of plaintiff taken on 1-15-75 m/n	
0-75	Filed deposition of plaintiff taken on 1-22-75 m/n	
3-75	Filed continued deposition of pltf. Murray Gladstone taken on 4-14-75 m/n	
5-75	Filed continued deposition of Morris Pearl taken on 4-14-75 m/n	
5-75	Filed deposition of deft. on 6-27-72 by Carl B. Grimm m/n	
5-75	Filed deposition of deft. by Robert J. Forrester on 6-27-72 m/n	
0-75	Filed depo. and offer of deft. motion for summary judgment	
13 now ret. on: June 19, 1975; pltf. is to serve his reply affdts. by June 19, 1975; pltf. is to serve his reply memorandum of law by June 19, 1975 and that the motion will be argued on June 19, 1975 at 10:00 a.m. before DUFFY, J. (H.E.V.)		
1-75	Filed pltf's affdvt. of Murray Gladstone in opposition to the deft's motion for summary judgment.	
1-75	Filed pltf's exhibits in support of above affdvt.	

Docket Entries

ONE V. FIREMEN'S FUND INSURANCE COMPANY

-PAGE 3-

72 Civ. 794

HFL

PROCEEDINGS

Filed pltf's memorandum in opposition to deft's motion for summary judgment.

07-02-75 Filed OPINION #42722...For reasons stated the defendant is granted summary judgment and the complaint is dismissed. Defendant is directed to refund to the pltf. the premium paid. submit order and judgment accordingly. So ordered. -- Werker.

m/n

07-02-75 Filed memo endorsed on deft's motion for summary judgment: Defendants motion grant see opinion #42722. so ordered. - Werker, J. m/n

07-14-75 Filed order and judgment that defendants motion for summary judgment is in all respects granted, that plaintiffs action be dismissed on the merits, and that defendant recover its costs from plaintiff, and that defendant refund plaintiff the premium paid by plaintiff on the Jeweler's Block policy herein. - Werker, J. Judgment entered - Clerk.

07-24-75 Filed plaintiff's notice of appeal to the USCA for the 2nd Circuit from judgment and order dismissing complaint. - copy mailed to Bigham Englar Jones & Houston, E

08-05-75 Filed Bill of Costs taxed in the sum of \$838.52 in favor of the defendant and to be added to the judgment, docketed as judgment #75,658-Clerk.

08-12-75 Filed plaintiff's undertaking for costs on appeal in the sum of \$250( Fidelity and Deposit Co. Bond No. J 88 74 924).

08-12-75 Filed defendant's statement under general rule 9(g), which was received in Judge Werker's chambers on May 29-75.

08-12-75 Filed Memorandum in support of defendant's motion for summary judgment, which was received in Judge Werker's chambers on May 29-75.

08-12-75 Filed letter dated May 27-75, from James M. Hughes to Leo M. Laurance, a copy of which was received in Judge Werker's chambers on May 28-75.

08-12-75 Filed Reply Affidavit of plaintiff in opposition to defendant's motion for summary judgment, which was received in chambers of Judge Werker on June 18-75.

A TRUE COPY  
RAYMOND P. BURGHAYOR, Clerk

EJ *[Signature]*  
Deputy Clerk

NOTICE OF MOTION FOR SUMMARY JUDGMENT (Filed June 9, 1975)  
UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

la

MURRAY GLADSTONE,

NOTICE OF MOTION FOR  
SUMMARY JUDGMENT IN  
FAVOR OF DEFENDANT

Plaintiff, :

Civil Action No.

-against-

72 Civ. 794

FIREMAN'S FUND INSURANCE COMPANY, :

(H.F.W.)

Defendant. :

S I R :

PLEASE TAKE NOTICE, that upon the annexed affidavit of JAMES M. HUGHES, duly sworn to the 22nd day of May, 1975, and the affidavit of ROBERT J. FORRESTER, duly sworn to the 27th day of May, 1975, annexed hereto, the defendant's interrogatories and supplementary interrogatories propounded to the plaintiff, with due proof of service thereof, and upon the plaintiff's sworn answers to said interrogatories and to said supplemental interrogatories, and upon the summons, complaint, the amended answer of the defendant, the sworn depositions herein taken of the plaintiff and his agent and the sworn depositions of the defendant and its employees, and upon all the papers and proceedings heretofore had herein, the defendant will move this Court before Judge Walker at the United States District Court for the Southern District of New York, Foley Square, Borough of Manhattan, City of New York, on the 6th day of June, 1975, at 10 A.M., pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment in defendant's favor and against the plaintiff, MURRAY GLADSTONE, dismissing plaintiff's complaint upon the ground that there is no

genuine issue as to any material fact with respect to the defenses upon which this motion is predicated and that defendant is entitled to judgment dismissing the complaint as a matter of law, and for such other and further relief as to this Court may seem just and proper in the premises.

PLEASE TAKE FURTHER NOTICE that the plaintiff is required pursuant to the Rules of this Court, to serve answering affidavits, if any, at least two (2) days prior to the return date of this motion.

Dated: New York, New York  
May 27, 1975

Yours, etc.

BIGHAM ENGLAR JONES & HOLSTON  
Attorneys for Defendant

By James M. Hughes  
James M. Hughes  
A Member of the Firm  
Office and P.O. Address  
99 John Street  
New York, New York 10038  
732-4646

TO:

LEO M. LAURANCE, ESQ.  
Attorney for Plaintiff  
299 Broadway  
New York, New York 10007

AFFIDAVIT OF ROBERT J. FORRESTER IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

MURRAY GLADSTONE,

Plaintiff,

-against-

FIREMAN'S FUND INSURANCE COMPANY,

Defendant.

STATE OF NEW JERSEY )  
: ss:-  
COUNTY OF ESSEX )

ROBERT J. FORRESTER, being duly sworn, deposes and says:

1. At the time of the loss herein I was employed by the defendant, Fireman's Fund Insurance Company, as a Special Agent and underwriter. I am fully familiar with the matters set forth in this affidavit in support of defendant's motion for summary judgment to dismiss the complaint.

2. Plaintiff sues for the loss of certain jewelry allegedly owned by him as a result of a robbery at his Westwood, New Jersey premises on May 21, 1971. The plaintiff's claim is for the limit of \$35,000 under a Jewelers' Block policy

issued by the defendant, Fireman's Fund Insurance Company, to the plaintiff, Murray Gladstone, t/a Jewelry by Gladstone, to be effective for one year beginning May 8, 1971.

3. The defendant, Fireman's Fund, does not dispute the occurrence of the robbery. Its position is that no liability exists under the policy because of certain breaches of warranty based upon misrepresentations made by plaintiff which are contained in a written application for the Jewelers' Block policy and because of certain breaches of conditions precedent contained in the policy itself. The application is called a Proposal, and a copy of the signed Proposal is attached hereto as Exhibit "A". The original thereof was attached to and made a part of the Jewelers' Block policy when issued to the assured (plaintiff).

4. The Proposal (Exhibit "A") contains a number of printed questions as well as the answers thereto. The answer to each question was given to me by the plaintiff. I asked Mr. Gladstone the various questions contained in the Proposal and he thereupon furnished the answers to me, which answers I then proceeded to insert in the Proposal in my handwriting. This was done in the presence of Mr. Gladstone. The broker, Mr. William H. Bohde of W. M. Ross & Company, Inc., Upper Montclair, New Jersey, was also present during the course of my question-

ing of Mr. Gladstone. Some of the answers to the questions are not in my handwriting. The written figure 5-1-71 in Question 17a. is not in my handwriting. The answers to Question 17e(1) through (12) are not in my handwriting. The bottom section of the very last page of the Proposal which refers to rates is not in my handwriting.

The breaches of conditions precedent in the policy.

5. The Jewelers' Block policy herein contains the following printed condition which is binding upon the assured:

"13. In the event of loss or damage, or of anything likely to result in a claim under this policy, the Insured shall give immediate notice in writing to the Company, protect the property from loss or damage, furnish a complete list of the lost or damaged property stating the market value and cost of each article and the amount claimed thereon; and the Insured shall within sixty (60) days after a loss (unless such time is extended in writing by the Company), render to the Company a proof of loss signed and sworn to by the Insured, stating the knowledge and belief of the Insured as to the following: The time and cause of the loss or damage; the interest of the Insured and of all others in the property affected; the cash value of each item thereof, and the amount of loss of or damage thereto; all encumbrances thereon; all other contracts of insurance, whether valid or not, covering any of such property and shall furnish a copy of all the descriptions and schedules in all such insurance policies if required."

I have searched the records of Fireman's Fund Insurance Company, and I have failed to find any record of the plaintiff-assured ever having filed at any time either a Proof of Loss signed and sworn to by him or a written notice of loss to the Company with respect to the loss involved in this lawsuit. As indicated in the accompanying affidavit on this motion of our attorney, James M. Hughes, the plaintiff-assured candidly admits that the only document ever given by him to the Company was a statement signed by plaintiff dated June 1, 1971, which statement was taken by Carl B. Grimm, a claims representative of Fireman's Fund Insurance Company upon questioning of Mr. Gladstone at the time Mr. Grimm visited plaintiff's premises in Westwood, New Jersey on June 1, 1971 to examine into the facts and circumstances of the subject loss. The said signed statement, a copy of which is annexed to Mr. Hughes' affidavit, is not the sworn Proof of Loss required by the policy herein, nor is it the immediate written notice of loss to the Company required by policy terms and conditions. I have also examined the records of Fireman's Fund Insurance Company, and I have failed to find any record of the plaintiff-assured ever having furnished to the Company a complete list of the alleged stolen jewelry listing both the market value and the cost of each stolen item as well as

the amount claimed on each stolen item as required by the aforementioned Condition 13 of the policy. If the plaintiff now contends that he furnished such list to anyone on behalf of the defendant, he should be called upon to annex a true and complete copy of such list to his opposing affidavit, if any, on this motion and set forth the identity of the individual to whom such list was given and the date thereof.

6. For the purposes of this motion only, the claimed breaches of warranty by plaintiff are limited solely to plaintiff's answers to Questions 2 and 11 of the signed Proposal, although I have been verily informed by our attorney that the remaining affirmative defenses in the answer, upon which defendant will necessarily rely to defeat a recovery, if such action is ultimately found necessary, relate to plaintiff's breach of the bookkeeping warranty (Question 6) and also the plaintiff's breach of Condition 8 of the policy requiring the plaintiff to maintain a detailed and itemized inventory of his property in such manner that the exact amount of plaintiff's loss can be accurately determined therefrom by the Company.

7. Question 2 of the Proposal relates to the twelve months immediately preceding the date of the Proposal and reads as follows:

"The answers to questions 2, 11a, 11c, 11d, 17c and 17d must be based on the 12 months period immediately preceding the date of this proposal.

\* \* \* \* \*

"2. NATURE OF OUR BUSINESS BASED ON SALES:  
Manufacturing....% Wholesale 10% Retail 90%  
Pawnbroking.....%"

The answer furnished to me by Mr. Gladstone in response to said question regarding the nature of his business based on sales for the twelve months immediately preceding April 27, 1971 was "Wholesale 10% Retail 90%." This answer was untrue. As indicated in the accompanying affidavit of James M. Hughes, plaintiff has admitted under oath in sworn answers to interrogatories that his business based on sales during said period was 100% wholesale. The information furnished by the assured in the Proposal is in turn used in the calculation of the total premium which is to be charged for the issuance of the particular policy. A copy of the Jewelers' Block Rating Slip prepared by Insurance Services Office of New York, the rating organization in which the defendant is a subscriber, is annexed hereto marked Exhibit "B". Had the answer to Question 2 in the Proposal set forth that plaintiff's business based on sales for the preceding twelve months was 100% wholesale rather than 10% wholesale and 90% retail, a higher premium would have been charged than was actually charged to plaintiff in this

instance pursuant to the filed rate schedule of defendant.

8. By statute, Chapter 29A of New Jersey Statutes Annotated, Sec. 17:29A-6, the defendant, Fireman's Fund, a licensed insurer in New Jersey, was required to file with the Commissioner of Banking and Insurance of New Jersey at Trenton, New Jersey, its schedule of rates for various classes of insurance including the Jewelers' Block policy. Section 17:29A-15 prohibits the insurer from charging or receiving any rate which deviates from the schedule of rates thus filed. Thus, as a matter of law, the defendant could not have made the contract of insurance herein at the same premium if it had been advised of the true facts.

9. The Proposal (Exhibit "A") is dated April 27, 1971, and the effective date of the policy annexed to the plaintiff's complaint is May 7, 1971. At such times, pursuant to the above mentioned statute, there was on file with the Commissioner of Banking and Insurance at Trenton, New Jersey, the defendant's Jewelers' Block rating schedule. The said rating schedule was used in preparing the Jewelers' Block rating slip (Exhibit "B") by the aforementioned rating organization.

10. Question 11a.c.d. of the Proposal relates specifically to the 12-month period immediately preceding the date of the Proposal and the said question reads as follows:

"11. Property outside of our Premises as set forth in Question 1 c during the last 12 months:

a. In the custody or control of the Proposer, Employees, Members of the Firm or officers of the Corporation or salesmen:

1. In cities or towns in which the Proposer's premises are situated.

<u>NAME</u>	<u>Number of Days</u>	<u>Average Amount</u>	<u>Maximum Amount</u>
-------------	-----------------------	-----------------------	-----------------------

None -- New business

2. Elsewhere in the states of United States, the District of Columbia, Canada and Puerto Rico.

<u>NAME</u>	<u>Number of Days</u>	<u>Average Amount</u>	<u>Maximum Amount</u>
-------------	-----------------------	-----------------------	-----------------------

None -- New business

3. Elsewhere [NOT ANSWERED]

b. \* \* \*

c. The estimated average daily amount of property in the custody or control of others except as provided in answer to Questions 11a, 11b, 11d and 16b during the last 12 months was \$2500 estimated new business

IMPORTERS: Include value of property in the custody of United States Customs, appraisers' stores and custom house brokers.

d. SHIPMENTS: The Total Amount of property shipped AT OUR RISK during the last 12 months did not exceed:

1. SURFACE SHIPMENTS BY FIRST CLASS REGISTERED MAIL AND RAILWAY EXPRESS New business  
(1) Within the limits of: (a) the states of the United States (excluding Alaska and Hawaii), the District of Columbia and Canada (in and between); (b) Alaska; (c) Hawaii; (d) Puerto Rico \$ [NOT ANSWERED] (2) Between the above places \$ [NOT ANSWERED].
2. SHIPMENTS BY ARMORED CAR \_\_\_\_\_ \$ [NOT ANSWERED].
3. AIR SHIPMENTS BY FIRST CLASS REGISTERED AIRMAIL AND AIR EXPRESS, DIVISION OF RAILWAY EXPRESS  
(1) Within the limits of: (a) the states of the United States (excluding Alaska and Hawaii), the District of Columbia and Canada (in and between); (b) Alaska; (c) Hawaii; (d) Puerto Rico \$ [NOT ANSWERED] (2) Between the above places \$ [NOT ANSWERED]
4. ALL OTHER SHIPMENTS COVERED BY POLICY (See Clause 5(E)) \$ [NOT ANSWERED]."

11. The answer furnished to me by Mr. Gladstone in response to Question 11a.1.2.3. regarding the location of his jewelry merchandise during the preceding twelve months which was in the custody or control of the plaintiff-assured himself outside of the premises to be set up at 263 Center Avenue, Westwood, New Jersey was "None-New business." This statement by plaintiff was untrue as is established by plaintiff's sworn pre-trial testimony on the point which is referred to in the accompanying affidavit of James M. Hughes. No mention was made

to me by Mr. Gladstone that for a substantial period of time prior to April 27, 1971, he was exhibiting his jewelry wares and stock of merchandise and actually transporting said jewelry in many areas outside Westwood, New Jersey and also selling said jewelry to prospective customers throughout various parts of the United States including California, Illinois, Missouri and New York. Had all of such facts been made known to me in response to Question 11, the same would have been incorporated in the answer to Question 11 and the premium rate would, accordingly, have been higher than was actually charged based upon the answer as given.

12. Question 11 on its face refers to the 12-month period immediately preceding the date of the signing of the Proposal and not to the business period subsequent to the signing of the Proposal when plaintiff expected to open his store at Westwood, New Jersey. It is undisputed that the information contained in the Proposal determines the makeup of the rate, and Mr. Gladstone read the Proposal with the questions and answers therein before he signed the same. The rate filings referred to herein would have required, as noted previously, the computation of a higher premium if, in fact, the misrepresentations contained in "2" and "11"

13a

of the Proposal had not been made.

WHEREFORE, your deponent respectfully submits that the motion of the defendant for summary judgment dismissing the complaint be granted.

s/ Robert J. Forrester  
Robert J. Forrester

Sworn to before me this  
27 day of May, 1975

s/ Elizabeth M. Suidera  
Notary Public

NOTARY PUBLIC OF NEW JERSEY  
My Commission Expires Nov. 8, 1976

## AFFIDAVIT OF JAMES M. HUGHES IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

(Same Title)

STATE OF NEW YORK )  
: SS:-  
COUNTY OF NEW YORK )

JAMES M. HUGHES, being duly sworn, deposes and says:

1. That I am an attorney and counselor-at-law duly admitted to practice in the courts of this state, including this Court, and I am a member of the firm of Bigham Englar Jones & Houston, the attorneys for the defendant in the above-entitled action. I have been in charge of this case from inception and am fully familiar with all the matters hereinafter set forth. This affidavit is made in conjunction with that of Robert J. Forrester in support of defendant's motion for summary judgment dismissing the complaint.

2. The amended answer, the original of which is now on file in this Court, contains a number of defenses based upon the conditions and warranties of the Jewelers' Block policy issued to plaintiff. The said policy along with the signed Proposal is annexed to plaintiff's complaint, all of which are on file in this Court.

Clause 1 of the policy states on its face that the Propo-

sal is part of the policy of insurance and is agreed to be the basis of the policy. Needless to say, no part of the Proposal or the policy itself can be varied or contradicted by parol evidence. This is important by reason of the fact that the Proposal states on its face that the answers to certain questions must be based on the 12-month period immediately preceding the date of the Proposal.

3. The accompanying affidavit of Robert J. Forrester sets forth the various misrepresentations made by the assured in his Proposal for the policy herein. It also sets forth the factual basis establishing the breach of Condition 13 of the policy requiring the filing by plaintiff of a sworn proof of loss with the Company and other requirements as set forth in Condition 13. These breaches of warranty and conditions precedent in the policy preclude any recovery on the part of plaintiff and, in addition, operated to make the policy null and void. The authorities in point will be furnished to the Court in a memorandum of law.

4. At the outset, your deponent directs this Court's attention to the fact that the motion herein is restricted solely to those affirmative defenses involving a consideration of the legal issues with respect to Condition 13 of the policy and

also with respect to Questions 2 and 11 of the signed Proposal where, it is respectfully submitted, no genuine issue of material fact exists. The remaining affirmative defenses in the answer dealing with the plaintiff's breach of the bookkeeping warranty and the further breach of Condition 8 of the policy requiring the keeping of certain records by the plaintiff to enable the Company to accurately determine the amount of plaintiff's alleged loss will be reserved for a plenary trial of the issues in the event that a trial ever becomes necessary.

5. In an effort to raise a fact issue on the specific defenses now being asserted on this motion, it can be anticipated that plaintiff will attempt to establish an alleged "waiver" of policy terms and conditions, particularly those dealing with the requirement for the filing of a sworn Proof of Loss by the plaintiff-assured and the other obligations resting upon an assured under Condition 13 of the policy. Apropos of such anticipated attempt on plaintiff's part, we direct this Court's attention to Clause 7 in the policy herein and the New Jersey authorities in support thereof. Clause 7 reads in part as follows:

". . .No agreement, condition or declaration of this policy shall be waived or changed, nor shall notice to, or knowledge possessed by an agent or any other person be held to

effect a waiver or change in any part of this policy unless endorsed hereon."

A reading of the policy annexed to the complaint will disclose that it contains no endorsement as referred to in Clause 7 quoted above.

6. It is not disputed that the plaintiff is an educated and adroit business man who has no difficulty in reading and writing English. There is also no dispute but that plaintiff's signature appears on the Proposal on the last page thereof. The manner in which the Proposal was prepared and then signed by Mr. Gladstone is best set forth in the sworn testimony of Mr. Robert J. Forrester taken upon examination before trial by plaintiff's attorney:

Q I show you a photostatic copy, and we will produce the original if possible -- would you say this is a fair representation of a Proposal for a Jewelers' Block Policy for Murray Gladstone, doing business as Jewelry By Gladstone, located at 263 Center Avenue, Westwood, New Jersey?

A Yes, sir.

\* \* \*

Q During the time that you visited the [plaintiff's] premises on the aforesaid date, did you have a conversation with Mr. Gladstone?

A Yes, sir.

Q Would you please tell us what ques-

tions you asked him that day?

A I went to complete the Proposal for the policy.

Q Have you examined a photostatic copy of that Proposal?

A Yes, I have examined it.

Q Is that in your handwriting or in Mr. Gladstone's handwriting?

A Most of it is in my handwriting, but not all.

Q Please refer to the answers to the questions that are not in your handwriting.

A 17a, there is a written figure 5-1-71 which is not in my handwriting.

And the answers to question 17e, 1 through 12, were not in my handwriting.

And on the very last page of the Proposal, the bottom section which refers to rates, none of that is in my handwriting. . . .

Q Let's go back to question number 2.

In question number 2 I notice you say wholesale 10 percent, retail 90 percent; and that is in your handwriting?

A Right, right.

Q Could you please tell me how you arrived at those figures?

A Mr. Gladstone gave them to me.

\* \* \*

Q I refer to question number 11.

Is that your handwriting?

A Yes.

Q You have there, "none -- new business."

Could you tell me what you meant by putting in "new business" there?

A That question refers to an exposure that existed in the last twelve months.

If this was a new business, he wouldn't have any.

Q Did you ask him about any material that he would have or did you put it in on your own?

A I asked him.

Q What did he say to you?

A In this particular question he would have said, no.

There was no exposure, because he was not in the business at the time.

Q Did you have a conversation with him in reference to an insurance policy that was in existence at that time?

A No, never.

Q In your questioning for preparation of this insurance, did you make any inquiries as to whether there was any existing insurance?

A Yes.

Q What question was that in?

A The very last page. Description of premises: number 3.

Give names and addresses of other locations of the Proposer -- (pp. 4, 5, 6, 7 and 8 of testimony)

\* \* \*

Q Did you have a discussion with Mr. Gladstone if he had employed anyone else in the previous twelve months before he would open his business?

A I don't recall asking a question in that vein.

Q You have "None -- new business."

Under paragraph 11 it says:

In the custody and control of the Proposer, employees, members of the firm or officers of the corporation or salesmen.

Could you give us, if you can remember specifically, just what you asked him at that time?

A I asked him, during the last twelve months was there any property outside the premises in custody and control of the Proposer, employees, members of the firm or officers of the corporation or salesmen, and the answer was none, because this is a new business. It was a new business venture. That is as far as he told me.

Q All he told you is it was a new business"

A Yes.

Q During the course of your conversations with him in relationship with this Proposal, did he happen to make mention of any specific -- any items of jewelry that he possessed at the present time?

A No.

\* \* \*

Q Mr. Forrester, when you had it, the Proposal, Plaintiff's Exhibit 1 with you, would you have gone over each of the questions and read the questions to Mr. Gladstone?

A Yes.

Q Did he have a copy of the Proposal in front of him as you were doing this?

A I had a copy in front, myself. We usually look at it together.

Q Were you doing that in this particular instance?

A Yes, we were.

Q Would your procedure have been to read the particular question to Mr. Gladstone and then take down his answer and write it in your own handwriting?

A Yes.

Q That would have been the procedure?

A Yes.

Q Did you follow that procedure in respect to each of the questions contained in the Proposal?

A Yes.

\* \* \*

Q Did Mr. Gladstone sign the Proposal in your presence?

A Yes.

Q Does the signature appear in the middle of the page under question number 18 (handing)?

A Yes.

Q The date which appears there, 4-27-71, in whose handwriting is that?

A My handwriting.

\* \* \*

Q Did he at any time tell you during the course of filling out this Proposal that he had been doing business under the registered trade name of Jewelry By Gladstone?

A No. . . .

Q Then there are a number of subquestions, and I call your attention to number 3:

Give names and addresses of other locations of the Proposer and of other concerns engaged in the jewelry trade under the same ownership or management as the Proposer and not included in this Proposal.

Did Mr. Gladstone, when you read that question to him, tell you that he had been doing business under the name of Jewelry By Gladstone?

A No.

Q If he had given you that information,

would you have inserted it in the Proposal.

A I would have put it in the Proposal, asked him who the insurance company was and the policy number.

Q Would you in the ordinary course of your conference with him, if such information had been supplied to you, would your Underwriter have occasion to check with the prior insurance company?

A It might, yes.

Q Did Mr. Gladstone tell you at any time in the course of your conference with him on April 27, 1971, that he carried insurance with another insurance company on his stock in trade?

A No.

\* \* \*

Q Was it your usual practice to read Proposed assured the specific question?

A It always is.

Q And the answers are always the ones given by the Proposed assured, and this is what you put in there; you supply no answers yourself?

A No. (pp. 10, 11, 12, 13, 14, 15, 16 and 17 of testimony)

A copy of Mr. Forrester's sworn pre-trial testimony will be submitted to the Court in the event that the original thereof has not already been filed by plaintiff's attorney with this Court.

7. In connection with the warranty (Question 2) contained in the signed Proposal, the plaintiff has sworn in answer to defendant's Interrogatory #30 that the percentage amount of plaintiff's business based on sales for the 12-month period prior to the signing of the Proposal for Jewelers' Block insurance was all wholesale. Also in answer to defendant's Interrogatory #29, plaintiff has stated that he filed a sales tax return with the State of New Jersey for the period November 1, 1970 to March 31, 1971 disclosing that all his sales for said period were at wholesale. It is not disputed that plaintiff was engaged in the jewelry business either in his individual name or trading under the assumed business name of Jewelry by Gladstone during the period from October 1, 1970 to the date of the signing of the Proposal. This undisputed fact is contained in plaintiff's own sworn pre-trial testimony as set forth in the original transcript of such testimony now on file in this Court.

8. In connection with the warranty (Question 11) contained in the signed Proposal relating to the location of plaintiff's property outside of Westwood, New Jersey in the custody or control of the proposer (plaintiff) for the 12-month period prior to the signing of the Proposal, plaintiff

has testified under oath upon examination before trial that during the period October 1, 1970 to the date of the signing of the Proposal, he had in his custody and possession a quantity of jewelry allegedly belonging to him which he exhibited and sold to various customers in such diverse places as California, Illinois, Missouri and New York. In addition, plaintiff has furnished a sworn answer to Interrogatories #16 through #20 to the effect that he stored a certain portion of his jewelry stock in a safe on the premises of Modern Jewelry Casting Co. Inc. in New York City during said period of time. None of these facts was given to Mr. Forrester at the time he prepared the Proposal containing plaintiff's signature. The law of New Jersey is well settled, as is pointed out in defendant's memorandum of law, that an applicant signing a proposal for Jewelers' Block insurance in that state is conclusively presumed to have read the proposal which he signs and is thereby bound by the answers contained therein notwithstanding the fact that the answers may have been inserted in the proposal by another on his behalf. The fact that plaintiff may have innocently, mistakenly or negligently failed to supply answers regarding his business dealings for the 12-month period prior to the signing of the Proposal in response to Question 11 of the Pro-

posal is wholly immaterial under New Jersey law, as is set forth in the defendant's memorandum of law.

The Plaintiff's Breach of Condition 13  
of the Policy.

9. Condition 13 of the policy sued upon binds an assured to do three (3) things: (a) give immediate written notice of loss to the Company, (b) furnish a complete list of the lost property stating the market value and the cost of each article and the amount claimed thereon, and (c) render to the Company within sixty days after a loss a Proof of Loss signed and sworn to by the assured furnishing certain specific data and information.

10. Plaintiff has sworn in answer to defendant's Interrogatory #32 that the only so-called "Proof of Loss" given by him to the defendant at any time relative to the subject loss was a signed statement given to defendant's agent. The signed statement in question dated June 1, 1971, a copy of which is annexed hereto and marked Exhibit "C," was taken by Carl B. Grimm, a claims representative of the defendant, at the time he initially visited plaintiff's premises in Westwood, New Jersey on June 1, 1971. We need not point out that the annexed exhibit does not even begin to comply with the requirements of Condition 13 of the policy in almost every respect.

In addition, it is not a sworn statement as required by Condition 13. Realizing no doubt the deficiencies inherent in said document as a sworn Proof of Loss, plaintiff's attorney asked Mr. Grimm the following question upon the latter's examination before trial regarding the preparation and execution of said document and related matters pertaining thereto.

Q I show you this handwritten statement (indicating) --

A I have a carbon copy.

Q (Continuing) -- it is seven pages.

Is this statement in your handwriting?

A No, it is in Mr. Gladstone's.

Q Did he prepare this while you were present?

A Yes, he did.

Q Did he prepare this under your questioning?

A Basically.

Q Beg your pardon?

A Basically.

Q He prepared this under your questioning, am I correct?

A Yes.

Q After he finished, did you swear him to this statement?

A To the extent that he wrote, "I have read this seven page statement and it is true."

Signed: Murray Gladstone.

Q Are you a Notary, and do you have the powers under the State of New Jersey to administer oaths for sworn statements?

A The answer is, no, to both questions.  
(pp. 5 and 6 of testimony)

\* \* \*

Q At any time during the course of your visits to the premises of Mr. Gladstone after the loss, were you ever shown any inventory books setting forth the material which is shown in Defendant's Group Exhibit A?

A No.

Q Did you ask the assured for copies -- for any of the inventory books, if he had any?

A I asked him for any and all records.

Q What records did he produce for you?

A Basically a Rolodex and some miscellaneous papers that were impossible for me to make head or tails out of.

At that time I suggested that he get an accountant or someone, to bring him in and put them in order.

Q Your first visit to the premises was on June 1st, I believe?

A Correct. (p. 10 of testimony)

It is clear from all of the foregoing that plaintiff did not render to the Company a sworn Proof of Loss containing the precise data and information required by Condition 13 of the policy. There is also no indication, as pointed out in Mr. Forrester's accompanying affidavit, that the plaintiff ever furnished to the Company or to any of its representatives a complete list of the stolen property stating the market value and the cost of each article and the amount claimed thereon. Such a document is important to the Company in distinguishing between purchased merchandise and memorandum merchandise.

11. Condition 13 of the policy also requires immediate written notice of the loss to be given by the assured to the Company. It is rather clear from the plaintiff's own sworn pre-trial testimony that no written notice of the loss was ever given by plaintiff to the Company or to its agent.

Q After the occurrence of the robbery, did you notify anyone associated within your insurance company?

A Sure

Q Who did you notify and when?

A I called up the fire insurance people that sold me -- Mr. -- I don't remember his name. It is on my contract -- Mr. B. something.

Leo, would you have the original who

wrote the contract?

MR. LAURANCE: Yes. Why don't you give him this contract. That would refresh his recollection. It has everything on it.

What Exhibit is it? The insurance contract. This is a copy of the contract. Does that refresh your recollection, Murray?

A I called this fellow and told him about the robbery.

Q Who is this fellow?

A Bodey.

Q Spell it.

A William Bodey.

Q Is he an insurance broker in Westwood?

A I don't know where he is. In Montclair maybe, I don't know.

Q Was he your insurance broker?

A He is one of the fellows. There are two or three that came around. I don't remember.

Q You say that you notified him by phone.

A Yes, I called him and told him about it.

Q Did you send him a letter of any kind?

A I don't remember. They sent around my friend Grimm.

Q. Did you at any time send a letter or

a writing of any kind to the insurance company regarding this particular loss?

A Well, I received notice that the gentlemen are coming down.

Q I am not asking you that, Mr. Gladstone. Would you try to be precise and just answer the question.

Did you send any letter or a written notice to the company regarding this particular robbery?

A Yes, sir.

Q Will you produce that letter, or a copy of it.

A You just have it right there. That Mr. Grimm wrote, that whole statement.

Q I don't think that you understand my question. Are you referring to the signed statement that you gave?

MR. LAURANCE: He is talking before the signed statement.

Did you send him a letter telling him that, "I was robbed, come done and examine, or whatever it is." This is what he wants to know.

MR. HUGHES: The answer is no.

A I don't recall. All I know, the company got in touch with me so I did the right thing. Whether I called or wrote a letter, I don't recall. (pp. 27, 28 and 29 of testimony)

In the event plaintiff ever gave such written notice to the Company or its agent, he can readily attach a copy of said

written notice to his opposing affidavit, if any, on this motion to rule out any issue on the point. The fact that the Company may not have been prejudiced by the receipt of a telephone notice of loss from the broker rather than written notice from its assured is entirely immaterial under New Jersey law as is pointed out in defendant's memorandum of law. It was one of the conditions of the policy to be fulfilled by the assured upon which defendant's obligation to pay the loss is dependent and defendant chooses in this case to rely on such condition.

12. It is respectfully submitted that no triable issue of fact is presented with respect to the affirmative defenses upon which the motion herein is predicated and that plaintiff's complaint should be dismissed as a matter of law.

WHEREFORE, your deponent respectfully prays for an order granting summary judgment dismissing the complaint.

Sworn to before me this  
22nd day of May, 1975

s/ James M. Hughes  
James M. Hughes

s/ Seymour Miller  
Notary Public

SEYMOUR MILLER  
NOTARY PUBLIC, State of New York  
No. 31-2716311  
Qualified in New York County  
Commission Expires March 30, 1977

**EXHIBITS ANNEXED TO FOREGOING AFFIDAVIT:**

## EXHIBIT A - PROPOSAL FOR JEWELERS' BLOCK POLICY:

JB 1371

## PROPOSAL FOR JEWELERS' BLOCK POLY.

TO BE EFFECTED WITH

33a

IM 2208  
(Ed. 6-69)

**FIREMAN'S  
FUND  
AMERICAN  
INSURANCE COMPANIES**

FIREMAN'S FUND INSURANCE COMPANY  
 THE AMERICAN INSURANCE COMPANY  
 NATIONAL SURETY CORPORATION  
 ASSOCIATED INDEMNITY CORPORATION  
 AMERICAN AUTOMOBILE INSURANCE COMPANY

This proposal must be completed and signed in duplicate. One signed copy, together with signed supplementary information, if any, will be attached to the policy.

Quotations cannot be given on incomplete proposals. If the answer to any question is none, state "NONE" or "NIL".

The answers to questions 2, 11a, 11c, 11d, 17c and 17d must be based on the 12 months period immediately preceding the date of this proposal.

1. a. Our firm or corporation name is *Murphy Jewel Store Inc*  
 b. The names of the individual members of our firm or of the officers of our corporation are *Murphy Jewel Store Inc*  
 c. Our premises are located at *2nd floor 263 Columbia Street, Bergen, N.J.*  
 Floor *11* Street number *263* City *Bergen* County *N.J.* State *N.J.*

2. NATURE OF OUR BUSINESS BASED ON SALES: Manufacturing ..... % Wholesale *10* % Retail *90* % Pawnbroking ..... %

3. EMPLOYEES: a. How many employees have you? *1* b. What is the least number of employees, officers or owners customarily on your premises at any time during business hours or when opening or closing for business? .....

4 LOSSES: Give statement covering all losses (insured or uninsured) during the past 5 years involving property covered by this form of policy, with dates, nature of loss and amount, name of insurer, and whether paid in full or otherwise.  
*None*

5. Within your knowledge has any insurer ever canceled or refused to issue or to continue any insurance for you? *No*  
 Give particulars.....

6. BOOKKEEPING: a. Do you keep a detailed stock record by nature of stock and value? *Yes* b. How often do you take a physical stock inventory? *Once a year*

7. JEWELERS' SECURITY ALLIANCE: Are you a member of the Jewelers' Security Alliance? *No*

## 8. AMOUNT(S) OF INSURANCE DESIRED

a. On Stock (Including other people's goods) - - - - -	\$ <i>35000</i>
b. On Money in Locked Safe at Proposer's premises against Theft by safe being broken open - - - - -	\$ <i>1000</i>
c. On Patterns, Molds, Models and Dies at Proposer's premises - - - - -	\$ <i>NIL</i>
d. On Furniture, Fixtures, Tools, Machinery and Fittings at Proposer's premises - - - - -	\$ <i>1000</i>
e. On Tenant's interest in Improvements and Betterments of Building(s) - - - - -	\$ <i>1000</i>

Note: Insurance on items 8 d. and e. may not be less than 80% of estimated value stated in answer to Question 18. The amounts and limits stated above are merely indications and are not to be considered as either increasing or diminishing the amounts for which the policy is issued.

## 9. What limits do you desire for clause 2 of this policy?

Clause 2 (B) \$ *5000* Clause 2 (C) \$ *2500* Clause 2 (D) \$ *NIL* Clause 2 (E) \$ *2500*

## 10. OPTIONAL COVERAGES AND PROVISIONS:

a. Do you wish to EXCLUDE Fire and Lightning on property at premises referred to in answer to Question 1 c?  Yes.  No.  
 b. Do you wish to cover at premises referred to in answer to Question 1 c:  
 (1) Flood?  Yes.  No. (If "yes", full particulars of flood exposure to be furnished.)  
 (2) Earthquake? (Available only when fire and lightning are not excluded.)  Yes.  No.

NAME	Number of Days	Average Amount	Maximum Amount
None - None			
Business			

2. Elsewhere in the states of United States, the District of Columbia, Canada and Puerto Rico.

None - None - Business

3. Elsewhere

b. THE NAMES AND HOME ADDRESSES OF THE PROPOSER, EMPLOYEES, MEMBERS OF THE FIRM OR OFFICERS OF THE CORPORATION OR SALESMEN who may have property in excess of \$5,000.00 in their custody or control outside of the Proposer's premises:

NAME	HOME ADDRESS

c. The estimated average daily amount of property in the custody or control of others, except as provided in answer to Questions 11a, 11b, 11d and 16b during the last 12 months was \$..... *Not in control - New business*  
IMPORTERS: Include values of property in the custody of United States Customs, appraisers' stores and custom house brokers.

d. SHIPMENTS: The TOTAL AMOUNT of property shipped AT OUR RISK during the last 12 months did not exceed *New business*

1. SURFACE SHIPMENTS BY FIRST CLASS REGISTERED MAIL AND RAILWAY EXPRESS  
(1) Within the limits of: (a) the states of the United States (excluding Alaska and Hawaii), the District of Columbia and Canada (in and between); (b) Alaska; (c) Hawaii; (d) Puerto Rico \$..... (2) Between the above places \$.....
2. SHIPMENTS BY ARMORED CAR..... \$.....
3. AIR SHIPMENTS BY FIRST CLASS REGISTERED AIRMAIL AND AIR EXPRESS, DIVISION OF RAILWAY EXPRESS  
(1) Within the limits of: (a) the states of the United States (excluding Alaska and Hawaii), the District of Columbia and Canada (in and between); (b) Alaska; (c) Hawaii; (d) Puerto Rico \$..... (2) Between the above places \$.....
4. ALL OTHER SHIPMENTS COVERED BY POLICY. (See Clause 5(E)) \$.....

12. SHOW WINDOW DISPLAY AT PREMISES (INCLUDING OUTSIDE SHOW CASE DISPLAY ON PREMISES) OCCUPIED BY PROPOSER.

Note: Property displayed in show windows, and in show cases not opening into the interior of the premises, is considered "protected" only when it is displayed behind vision plate glass (or its equivalent) secondary to windowpane or behind metal bars or grille entirely across window or show case, or behind shatterproof glass, or in a show case within the window.

a. Number of Show Windows (opening into the interior of the premises)..... *None* ..... How many are protected against window smashing and how?

Number of Outside Show Cases..... *1* ..... Describe cases and location.....

How are they protected against forcible entry?

	PREMISES OPEN TO BUSINESS		PREMISES CLOSED TO BUSINESS	
	Protected	Unprotected	Protected	Unprotected
b. During the term of Insurance, the maximum value declared will not exceed	\$.....	\$.....	\$.....	\$.....
(1) in all windows and outside show cases	\$.....	\$.....	\$.....	\$.....
(2) in any one window	\$.....	\$.....	\$.....	\$.....
(3) in any one outside show case	\$.....	\$.....	\$.....	\$.....
c. Limit of Liability to apply				

## 13. SHOW CASE AND SHOW WINDOW DISPLAYS OF PROPOSER NOT AT PREMISES OCCUPIED BY PROPOSER.

35a

If Proposer desires insurance on property displayed in show cases or show windows in building lobby or elsewhere than at premises occupied by Proposer, furnish full particulars of each display.

## 14. PREMISES PROTECTION

## a. ELECTRICAL BURGLAR ALARM SYSTEMS

Are your premises protected by an operating Mercantile Premises Alarm System?  Central Station?  Local Alarm?

Extent of Protection (1, 2 or 3) 2Grade (AA, A, B or C) 2Name of Protective Company P. G. Security Systems Inc.Date of Expiration Aug 1, 1971

Underwriters' Laboratories Certificate No.

## b. HOLDUP ALARM AND PROTECTIVE SYSTEMS

Is there a Central Station Holdup Alarm System protecting your premises?  Number of Signal Buttons 2

## c. WATCHMAN SERVICE

(1) State number of watchmen employed exclusively by you (or, if Proposal is for a leased department of a Department Store, then exclusively by the Department Store) and maintained on duty within your premises at all times when not regularly open to business

Note:

(2) Do such watchmen report or register at least hourly on weekdays, and each two hours on Sundays and holidays (a) to an outside Central Station? ..... (b) on a Watchman's Clock? .....

## 15. SAFES AND VAULTS

## a. Give full particulars of each safe or vault.

<u>Name</u>	<u>Expire</u>	<u>No.</u>	<u>Coff</u>	<u>NO. 2</u>
<u>6/1X3 X</u>	<u>6/1X3 X</u>	<u>1</u>	<u>Central Clock</u>	
<u>Central Clock</u>	<u>Central Clock</u>	<u>1</u>	<u>Central Clock</u>	
<u>Central Clock</u>	<u>Central Clock</u>	<u>1</u>	<u>Central Clock</u>	
<u>Central Clock</u>	<u>Central Clock</u>	<u>1</u>	<u>Central Clock</u>	

## b. PROTECTIVE DEVICES BEARING UNDERWRITERS' LABORATORIES LABEL OR WITH UNEXPIRED CERTIFICATE, TIME LOCK AND RELOCKING DEVICE

Give full particulars

<u>Name</u>	<u>Name</u>
<u>Central Station</u>	<u>Local</u>
<u>U. L. Cert. No.</u>	<u>U. L. Cert. No.</u>
<u>Grade (AA, A, B or C)</u>	<u>Grade (AA, A, B or C)</u>
<u>Expiration</u>	<u>Expiration</u>

## c. ELECTRICAL BURGLAR ALARM SYSTEM

(1) Central Station or Local System completely protecting safes or vaults.

<u>Name</u>	<u>Name</u>
<u>Central Station</u>	<u>Local</u>
<u>U. L. Cert. No.</u>	<u>U. L. Cert. No.</u>
<u>Grade (AA, A, B or C)</u>	<u>Grade (AA, A, B or C)</u>
<u>Expiration</u>	<u>Expiration</u>

(2) Central Station or Local System partially protecting safes or vaults.

<u>Name</u>	<u>Name</u>
<u>Central Station</u>	<u>Local</u>
<u>U. L. Cert. No.</u>	<u>U. L. Cert. No.</u>
<u>Grade (AA, A, B or C)</u>	<u>Grade (AA, A, B or C)</u>
<u>Expiration</u>	<u>Expiration</u>

Note: If the answers to Questions a, b and c above are not identical for each safe or vault, the following section MUST be completed:

d. Indicate minimum proportion by value of property on premises kept in each safe or vault at all times when premises are closed.

Total to agree with 16 a (1) and (2) ..... % %

## 16. WARRANTIES AS TO PROPERTY INSURED DURING TERM OF INSURANCE AT ALL TIMES WHEN PREMISES ARE CLOSED:

(Note: This section refers only to property described in Section 3 of this policy.)

## a. If more than one premises give details at each.

(1) The minimum proportion by value of property on premises kept in Locked Safes and Vaults protected as indicated under 15b will be ..... %

" " "	" 15c (1) will be	..... %	..... %
" " "	" 15c (2) will be	..... %	..... %

(2) The minimum proportion by value of property on premises kept in other Locked Safes and Vaults will be ..... %

No stock reported  
in Sec. 17 to be  
excluded from  
insurance

Complete if any  
stock included in  
Sec. 17 is to be  
excluded

(3) The maximum proportion by value of property on premises (including window display) out of Safes and Vaults will be ..... %

75	%	..... %
25	%	..... %



## EXHIBIT B - JEWELERS' BLOCK RATING SLIP

37a

## JEWELERS' BLOCK RATING SLIP

Inv.	Inv.	Inv.	Inv.
Inv.	Inv.	Inv.	Inv.
Total	Total	Total	Total
O/G	O/G	O/G	O/G
Total	Total	Total	Total

## WINDOW CHARGE:

PREMISES: = \$ 115.00	Total \$
% S.D.V.	
In Protected Sales	
In Unprotected Sales	
Ex. Sales	
%	
Retail & Pawnbroker. Nature Stock CR.	

TERRITORIAL CHARGES	
TRAVELING:	
In Own City	
Elsewhere	

SURCHARGE LIMIT 2 (E)	
15 WITH OTHERS	
SHIPLISTS:	
Reg'd Mail-Rail Exp. AR. Car @ .08	
Reg'd Mail-Rail Exp. @ .15	
Armored Car @ .04	
Air Reg'd Mail & Air Exp. @ .20	
Air Reg'd Mail & Air Exp. @ .30	
Other Shipments Clause 5 (E) @ .25	

AV. PREMISES RATE	
Charge	
Size of Policy	
Allow	
TOTAL: 330000	

CHARGE	
ALLOW	
1.37 + .0585	
.1965 + .3276	
.540 + .4680	
.80 + .9360	
.86 + 1.26 + .5200	
COMPANY F.D.U. 3	
PROPOSAL RECEIVED	

Name ST. MARY BY GLASSWARE

Address 263 CENTER AVE. WISCONSIN Dells

Proposal dated 4/2/77 Date 5/20/77

Man'l	% Wholesale	% Retail	% Pawnbroker
Total 350000	Policy Amount 350000	Charge Allow	

BURGLARY PROTECTION	
34302 375 1000 515 3	
34 - 73 1000 515 3	
Inventory	15%
(1) Dia. 10%	
(2) Pearls 10%	
(3) Prec. Stones %	
(4) Semi-Prec. 20%	
(5) Mid. Jly. 20%	
(6) Other Jly. %	
(7) Watches (Mid.) 15%	
(8) Other Watches %	
(9) Clocks 10% $\times 40 = 40$	
(10) Silv. & Plate 10% $\times 40 = 40$	
(11) Edgs. Migs. 10% $\times 40 = 40$	
(12) Other Stock 15% $\times 40 = 60$	
Total 100%	

LOSS EXPERIENCE	
Lg. Single Loss 8	
Year Premiums	
Total Losses	

FIRE INSURANCE	
1000000 1000000	

TOTAL	
EXPERIENCE CREDIT	

SUPPLEMENTAL COVERAGE	
Money \$1000000 @ 2% = 20000	

PATTERNS, MOLDS, ETC.	
-----------------------	--

basic coverage \$ 0 = 0	
-------------------------	--

FURN. & FIX.	
--------------	--

basic coverage \$ 400000 = 0	
------------------------------	--

IMP. & BETT. \$ 1000000 = 0	
-----------------------------	--

FURN. & FIX. } BASIC \$ 300000 + 164 = 3164	
---	--

IMP. & BETT. } COVER \$ 0 = 0	
-------------------------------	--

allowances \$ 0 = 0	
---------------------	--

JSA -- HOLDUP ALLOW. 9	
------------------------	--

ATT. DATE 5/1/77	
------------------	--

1.56 PREMIUM	
--------------	--

1.56 1.56	
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1.404 1.404	
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22 22	
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1.654 1.654	
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605 605	
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24-570 - 1000000 17	
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96 - 114 153	
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114 691	
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596 - 114 572	
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114 572	
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482 544	
---------	--

1320 114	
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1320 + 302 with D/A 1422	
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II Defendants Et al  
5/9/74  
6/1/71 LK

Westwood, N.J.

I Murray Gladstone 49 yrs of age,  
residing at 20 Valley Ave -  
Westwood NJ 07095 201-666 0423  
Debarley state -. That I am married  
( I fully separated 2 1/2 yrs ) - I have  
2 children , Boy age 8 - , girl - age 5  
Reside in a garden apt. For the  
last 15 years to Oct. 70 I was ~~employed~~  
employed by Modern Casting Corp. -  
26 W 44 Street NYC as General mgr.  
I was president of Corp and had  
50% interest of same. Our principal  
product was gold castings, which  
we manufactured and sold, to  
other manufacturers & Tailors.

Annual sales approximately \$500,000. To  
\$700,000. In Oct of 70 I sold  
my interest of the business to my  
Partner Mr M Pearl - 13 Hybernia Rd  
Wilton, New Jersey - I started a  
small wholesale business - out of my  
home for several months - Then  
decided to open a Wholesale Retail Jewelry  
store - The next several months  
we imported ~~many~~ various pieces  
manufactured for me. And Purchasing  
Murray Gladstone

II

6/1/71

Westwood N.J.

Diamonds - Precious & semi precious stones . which I added to my inventory which was accumulated by me over the years . I kept this stock in Modern Casting's safe .  
 26 W 47 Street . I had 25,000 Insurance (Ruby Policy ) thru my Brokerage 150 Madison St NYC . I had no insurance on these goods . But am sure their <sup>complete</sup> value was over 25,000 - but I don't know how much over - . On 5/1/71 I rented a upstairs office (33' x 18' x 9') which I converted into a Wholesale Retail Jewelry store - Located at 263 Center Ave Westwood . I put approximately \$500 - in furniture & fixtures - I also had installed an alarm system - By Vogue security system 335-75 St. No Bergen NJ 07047 - I had Vogue install contact switches on each entry door - (Two) Contact switches on each tilt window and on my safe - Safe measures 34.5" x 17" Ensign Safe (Class C Safe with an E chst ) - A Vibratory temperature and contact alarm system . Also installed were 2 stationary hold up switches & Radio control hold up switch - All made and

III  
6/1/71

radio control held up switch. Westwood N.J.  
The Radio held up switch I  
had not receive until the P.M. of  
3/21/71 - . On or about ~~April~~ <sup>my</sup> 27-71  
Vogee completed installation of alarm  
system. To the best of my knowledge  
all of the system was operative. I  
believe Vogee informed my insurance  
agent - William Bowdi - of W M Ross -  
agent One N.J. that alarm system was  
installed. He issued to me Underwriters  
Lab Certificate # 671029 - <sup>my</sup> 6/27/71 Prior  
to installation of my alarm system I  
went over my proposal of Jewelers  
lock Policy with Mr W. Bowdi,  
On 6/1/71 I again reviewed my  
proposal and found same to be correct  
in its entirety - with the exception  
of Item "17" "Inventory of all propertys  
wherever located" - Question 17  
which paragraph A states "The last merchandise  
inventory was taken on (give date) and  
is as effectly" - When I reviewed  
this question with Mr Bowdi I  
informed him that my records would  
(etc - that I had approx \$40 - 000 of  
merchandise both my stock and goods  
removed) - Murray Goldfarb

6/1/71

Westwood N.J.

I also told Mr Bowdi that I had between \$1,000 to \$15,000 of my own stock that I accumulated - over the years - for which I had no records. Giving me a grand total of inventory of approximately \$50,755.00 -

When Mr Bowdi informed me of cost of premium - I told him I could only afford on my inventory - \$35,000 worth of insurance, which is what I took out. During the next several weeks I also purchased and took in on memo another \$5,000. making my total stock of all goods on 5/21/71 approx. \$55,000.00 net

Starting on Oct 1970 I had various manufacturers fabricate for me various Rings, Pins, Tie Tacks Cuff Links, etc. which I made into a sample line and wholesaled to various jewelers - At the time I was trading as Tremby Big Gladstone was not Reg. Business I was registered in New York. By May

1971 I had accumulated Stock Inventory of \$50,000. On May 7 - 1971 Mr Bowdi informed me Murray Gladstone

6/1/71

Westwood N.J.

That my Tumlers Block Policy was bound. Therefore I brought my stock over to 263 Center St Westwood - To stock my store with.

Between May 1 1971 and May 21-71 I purchased and received on Melis's approx an additional \$15,000.00 in Stock. Giving me a grand total of approximately \$55,000.00 in Stock.

On 5/21/71 I had all of my stock in my store. I had none carry where else - On 5/21/71 I opened my store at 8<sup>00</sup> AM. I shut off alarms and opened safe & display my stock. At approx 8<sup>15</sup> PM someone knocked at door. When I opened same - A man placed a pistol at my head and said "If you make a false move I will shoot you". He then turned me around and pushed me in the closet. He held his foot against door and caused him say to someone else - constantly "hurry up - hurry up". Once when I tried to open door he warned me if I opened it he would put a bullet through the door.

None of Melis's

VI

6/1/71

Westwood N.J.

I was in Closet approx 15-20 minutes <sup>to</sup> and when I got silent I slowly opened door. They were gone so I ran down the stairs to see if I could see any one or a car. I didn't see anyone. I quickly ran back to my store and pushed the alarm button. Not being sure they were working I called the <sup>Police</sup> By Phone. The alarm did not register at Police Hq. But they responded to my phone call immediately. To the best of my knowledge all systems were in operation as of April 27. 71. as substantiated by Underwriter's Lab's Art. # 671029 which was sent to me by Vogee.

The police took the information they took prints - and we made a composite of a suspect. Prints were negative - . After Police left we had sales girl Miss Joann Sciarretta and I inventoried remaining stock which amounted to \$ 6,032.00 A check of our records revealed that we had returned \$ 650. in stock and sold approximately \$ 600.00 leaving us a balance stolen of \$ 5,750.00 -

Maurice J. O'dell

VII

6/1/71

Westwood N.J.

Fortunately ~~not~~ none of my  
customers goods was stolen. The  
only thing stolen was my stock  
and goods on memos. No damage  
was done to furniture and fixtures  
or to <sup>the</sup> building. The only other  
thing stolen was cash \$118.00.

I have read this seven page  
statement and it is true —

Murray Gladstone

## STATEMENT UNDER GENERAL RULE 9(G) (FILED August 12, 1975)

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x 72 Civ. 794

MURRAY GLADSTONE,  
Plaintiff,  
-against-U.S.DISTRICT COURT  
FILED  
Aug. 12, 1975  
S.D. OF N.Y.

FIREMAN'S FUND INSURANCE COMPANY,

Defendant.  
----- x

STATEMENT UNDER GENERAL RULE 9(G) OF  
THE MATERIAL FACTS AS TO WHICH THE DE-  
FENDANT CONTENDS THERE IS NO GENUINE  
ISSUE TO BE TRIED IN CONNECTION WITH  
THOSE PARTICULAR DEFENSES UPON WHICH  
THE MOTION FOR SUMMARY JUDGMENT HERE-  
IN IS PREDICATED

1. The plaintiff's sworn answers to defendant's Interrogatories #29 and #30 disclose that for the one-year period prior to the date of the signing of the Proposal on April 27, 1971, the percentage amount of plaintiff's business based on sales was 100% wholesale. Accordingly, the plaintiff's answer to Question "2" of the signed Proposal is untrue.

2. The plaintiff's sworn testimony given upon examination before trial (see original transcripts of plaintiff's sworn testimony as well as his sworn answers to defendant's Interrogatories "16" through "20" now on file in this Court) discloses that plaintiff was exhibiting and selling his jewelry

## Statement Under General Rule 9(G)

merchandise during the period beginning on or about October 1, 1970 to the date of the signing of the Proposal on April 27, 1971 to various customers throughout certain areas of the United States as far west as California and, furthermore, that a portion of plaintiff's stock in trade was stored during said period of time in a safe upon the premises of Modern Jewelry Casting Co., Inc. in New York City. Accordingly, plaintiff's answers to Question 11a.1, 2, 3 of the signed Proposal are untrue.

3. The plaintiff's sworn answer to Interrogatory #32 discloses that the only so-called "Proof of Loss" rendered by him to the defendant company was a signed statement dated June 1, 1971, taken by defendant's claim representative, Carl Grimm, from the plaintiff on said date, which document is annexed to the affidavit of James M. Hughes and marked Exhibit "C." The signed statement of June 1, 1971 is not the sworn Proof of Loss required by Condition "13" of the policy. The failure of plaintiff to render such sworn Proof of Loss to the company is a breach of Condition "13" of the policy.

4. The plaintiff's sworn testimony given upon examination before trial (see pages 27, 28 and 29 of Gladstone pre-trial

## Statement Under General Rule 9(G)

testimony) discloses that plaintiff only gave telephone notice of the loss to the broker and did not give written notice of the loss to the company as required by Condition "13" of the policy. The failure of plaintiff to give written notice of the loss to the company is a breach of Condition "13" of the policy.

5. The plaintiff's sworn answer to defendant's Interrogatory #33 discloses that plaintiff allegedly furnished to the agents of the defendant certain documents of which plaintiff's Exhibits "4", "5" and "6" annexed to the plaintiff's sworn answers to said interrogatories are said to be photocopies. An inspection of said Exhibits "4," "5" and "6" discloses that the same do not set forth the market value of each of the stolen items nor do they set forth the amount claimed by plaintiff on each stolen item. Exhibits "4," "5" and "6" cannot be classified or construed as a listing of the stolen items with the requisite information called for in Condition "13" of the policy. The failure of the plaintiff to comply with the foregoing provision of the policy is a breach of Condition "13."

Dated: New York, New York  
May 29, 1975

BIGHAM ENGLAR JONES & HOUSTON  
Attorneys for Defendant

By James M. Hughes  
James H. Hughes  
A Member of the Firm  
Office and P.O. Address  
99 John Street  
New York, New York 10038  
732-4646

## Statement Under General Rule 9(G)

C 321-Affidavit of Service of Papers by Mail  
Affirmation of Service by Mail on Reverse Side

Index No.

----- x  
72 Civ. 794

Plaintiff

against

AFFIDAVIT OF SERVICE  
BY MAIL

Defendant

----- x  
STATE OF NEW YORK, COUNTY OF NEW YORK ss:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age  
and resides at Jamaica, N.Y.

That on May 29, 1975 deponent served the annexed Statement  
Under General Rule 9(G) on Leo M. Laurance Esq.

attorney(s) for

in this action at 299 Broadway, New York, N.Y. 10007  
the address designated by said attorney(s) for that purpose by  
depositing a true copy of same enclosed in a postpaid properly  
addressed wrapper, in--a post office--official depository under  
the exclusive care and custody of the United States Postal  
Service within the State of New York.

Sworn to before me May 29, 1975      s/ Paul Yuan  
s/ Seymour Miller

SEYMOUR MILLER  
NOTARY PUBLIC STATE OF NEW YORK  
No. 31-2716311  
Qualified in New York County  
Commission Expires March 30, 1977

AFFIDAVIT OF MURRAY GLADSTONE IN OPPOSITION (Filed June 11, 1975) 49a

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

MURRAY GLADSTONE,

Civil Action No.

Plaintiff,

72 Civ. 794  
(H.F.W.)

- against -

FIREMAN'S FUND INSURANCE COMPANY,

AFFIDAVIT IN OPPOSITION

Defendant.

-----X

STATE OF NEW YORK )  
: ss.:  
COUNTY OF NEW YORK )

MURRAY GLADSTONE, being duly sworn, deposes and says:

1. I am the plaintiff in this cause of action and am fully familiar with all of the facts and circumstances herein. I am submitting this affidavit in opposition to the defendant's motion for summary judgment.

2. I am 53 years of age. I have spent more than 30 years in the jewelry business. During this period, I was never in the retail business of selling jewelry. I was always a jewelry caster or in the wholesale end of the jewelry business. My reputation in this business is beyond reproach for honesty, fair dealings, truthfulness and sincerity.

3. I have never had a robbery or an insurance loss in this business.

4. I will not, at this time, belabor the court with my tale of woe and horror over the last four years trying to obtain what is legally and rightfully mine. I will leave that for the trial.

5. I will now address myself solely to the issues raised by the affidavits submitted by Mr. Robert J. Forrester and Mr. James M. Hughes. They both allege that it is a fact that by my conduct before the policy was issued, I breached the warranties

Given by me when I signed the proposal for the jeweler's block policy. That by my conduct and my failure to act, I breached condition No. 13 of the policy.

BREACH OF WARRANTY

6. Mr. Forrester, who has underwriting experience for more than 15 years with the defendant, states in his affidavit commencing with paragraph 6 through paragraph 12 that on April 27, 1971 I told him nothing about my past experience. That he did not ask me anything about my past experience. He further states that he only asked me the specific questions in the proposal and since I told him it was a new business, he didn't ask me any other questions about my past experience. As far as he knew, I could have been the biggest thief, the day before he met me, and he wasn't interested in that fact one iota.

He further states that based on my answers to his questions, the premium rate was fixed. He now states that my answers were misrepresentations and relying on said misrepresentations, the defendant now has a right to declare my claim null and void.

7. Mr. Hughes, commencing with paragraph 6 of his affidavit through paragraph 8, repeats and realleges the same statements. In addition thereto, he supplements his allegations with quotes from the examination before trial of Mr. Forrester and the examination before trial of your deponent.

8. If the facts, as they state, were true, I must be the biggest thief, liar, cheat they have met. Their statements, as given, are stated completely out of context. The facts as they were in the year 1971 are hereinafter stated.

9. On April 27, 1971, Mr. Forrester appeared at my store located at 263 Center Avenue, Westwood, New Jersey by

appointment for the purpose of obtaining a proposal for a jeweler's block policy for the plaintiff's new business. Present at that time was my insurance broker and my bookkeeper-sales person.

10. After Mr. Forrester had introduced himself to me, we started to have a long conversation, preliminary to our completing the proposal. In the preliminary conversation, I gave him a complete history of my background in the jewelry trade. I told him of my ownership of Modern Casting located at 26 West 47th Street, New York City. I told him I sold my interest in that business on October 1, 1970.

I told him that after I left Modern Casting, I started a wholesale jewelry business with the goods that I had received for consideration in the sale of my interest in Modern Casting. That for the past six months I had been travelling throughout the United States trying to sell my merchandise.

I informed him that the merchandise that I had received and also merchandise that was being manufactured for me in my wholesale business was stored in the safe of Modern Casting at 26 West 47th Street, New York City. I informed him that this merchandise was covered with insurance by Fireman's Fund for both fire, safe burglary and holdup (Ex. 6).

11. After our preliminary conversation, he commenced filling out the proposal. There being only one copy, he asked the questions and wrote the answers. As we were talking, I was doing work in the store. I never saw the application. When I gave him the answer to question 17, I then signed where he showed me. I never read the application. I relied solely on the answers he inserted. He was a representative of the insurance company and I trusted him completely. When he started questioning me, more in particular question No. 2, he asked me in substance the following question: WHAT WILL THE PERCENTAGE OF MY INVENTORY BE WHEN I START

THE NEW BUSINESS? He never asked me the percentages of my other business nor was it our intention to refer to the past twelve months. As we went along answering the questions, most of the questions he would answer with the phrase, "New business" based on the information I had given to him in our preliminary conversation. When we came to question 17, he asked me about my inventory of my new business. I told him the inventory was incomplete. I told him my inventory was not in but it should be complete by the day I opened my new store. I informed him that part of my inventory had arrived. He saw this as I was working on it as we talked. As for the answer to question 17(e), the percentages given were approximate percentages referring to the new business. He was told that I never had carried silver, watches or certain other third party goods before. Therefore, the percentages would have to be guesstimates to equal 100%. In answer to questions 17(b), (c) and (d), he put in "New business." Mr. Forrester, by those answers, showed it was our intention at all times in this proposal to answer the questions only in relation to new business. There was never any question raised in answering the questions in this proposal relating to old business.

I direct attention of the court to plaintiff's exhibit No. 7. This exhibit differs greatly in relation to the answer to question 17(a) as stated in the defendant's Exhibit A. Plaintiff's Exhibit 7, more in particular the answer to question 17(a), shows a date inserted therein. This date was 5/1/71 which shows it was the intention of both the plaintiff and the defendant to answer the questions in the proposal only in relation to the new business that was to be started some time in May 1971.

Your deponent respectfully requests this court to direct the defendant to produce the original proposal in court because

after question 17 was answered, I signed the proposal, Mr. Forrester took possession of it and it is now in the possession of the defendant herein.

PLAINTIFF'S BREACH OF CONDITION 13 OF THE POLICY

12. Mr. Hughes, in paragraph 9 of his affidavit in referring to your deponent's breach of condition 13 of the insurance policy, put it very succinctly. I will at this time reply to his A-B-C.

A. Notice of Loss: Plaintiff gave immediate written notice of loss (Ex. 8). As soon as your deponent had sufficiently recovered from the shock of the robbery and had notified the police, he then called his insurance broker. This was no more than a few hours after the robbery. The insurance broker then called the defendant and confirmed this in writing. At the time of the trial, I will produce my insurance broker with his complete record to establish plaintiff's exhibit. This is necessary because I have been informed by my attorney that the insurance broker has been directed by the defendant not to divulge any information in his file to me though he was my insurance broker at the time. To obtain this exhibit was only through direction of the court (Ex. 11).

B. List of Stolen Property, etc.: Attached hereto and made part hereof is plaintiff's Exhibit 1, 2, 3, 4, 5 and 6. The affidavit of Joan Scharetta, which is included in the reply papers, explains the preparation of these exhibits in detail and what purpose they serve. Miss Scharetta also states that she made service of said exhibits on the defendant herein.

C. Sworn Proof of Loss: On June 1, 1971, Mr. Carl B. Grimm, an adjuster for the defendant, and two gentlemen appeared at 263 Center Avenue, Westwood, New Jersey, by appointment, to

investigate the loss, as per my written notice, to the defendant herein.

The two gentlemen started to work with Miss Scharett to take the inventory of the remaining goods on the premises. Mr. Grimm and your deponent started to have a long conversation. After a few hours, I had given Mr. Grimm the complete history of my involvement in the jewelry business. I informed him what type of work I had done in the business. I told him that I sold Modern Casting which I had for 16 years. I told him about my wholesale business for the last 16 months. I told him about all the goods that I had purchased. I told him about all the goods that I had manufactured for me. I showed him my bills of purchase, my bills of sale and my books in which I kept my records. I told him many other things which are included in the proof of loss. Defendant's Exhibit C is self-explanatory. After we had our conversation, he then told me he would dictate to me my proof of loss. As he dictated to me, I wrote what he said. After we had finished the seven pages before I signed he asked me if I swear that these pages are true. I answered him that they were. He then dictated the last paragraph and I signed the statement as dictated by him.

Mr. Grimm and the other two gentlemen then prepared to leave. Before Mr. Grimm left, he told me everything was in order. That if I would send him photostatic copies of plaintiff's Exhibit 1, 2, 3, 4 and 5, he would attach them to my proof of loss and it would be complete. He also told me, that from his observation, everything was in order. That to expedite the exhibits to him, would hasten the settlement of the claim. Mr. Grimm also told me it would also help if I would prepare a composite picture of my loss on one sheet so the loss can be easily determined. Mr. Grimm and the other gentlemen then left.

13. Your deponent and Miss Scharetta then commence to prepare and compile plaintiff's Exhibit 6. After it was finished, it was forwarded, as instructed.

14. During all this period of time, no insurance policy had been issued. From May 1, 1971 to June 8, 1971, the insurance coverage was only by binder (Ex. 12). Some time in the middle of June 1971, I received my insurance policy (Ex. 9).

15. After my appointment with Mr. Grimm, a Mr. Theodore Russo, an accountant and attorney for the defendant, called me to make an appointment to see me. He stated that he needed verification of a few items in my claim.

From the date of our first meeting until January 4, 1972 we had three or four conferences. In addition to these conferences, there were requests of verification of certain items in my claim. I supplied every document that he wanted. I supplied affidavits from my supplier that he wanted. I gave him copies of my income tax returns that he wanted. Anything he requested, he received.

On January 4, 1972, at a conference in his office, my claim was rejected. No reason was given for said rejection.

From that date until today, the defendant has never notified me in writing as to why they rejected my claim. Attached hereto as plaintiff's Exhibit 13 is a copy of Mr. Russo's report to the insurance company verifying everything I have stated. There is no question as to verification of more than \$32,000.00 of the loss. There is no question as to a proof of loss being sworn to and served. There is no question as to notice of loss. The sole question that he has is, where did I get the gold, etc. He also wanted to know whether I received \$8,900.00 in goods for the sale of Modern Casting. There was also a question as to the purchase of the diamonds from Frey. The report speaks for itself.

The sole legal question raised by him which is not in issue at this time was whether I kept detailed books and records.

16. I herewith solemnly affirm that in the preparation of the aforesaid proposal, I told Mr. Forrester the following information:

A. All about my interest in Modern Casting and the sale thereof;

B. All about my wholesale business for six months before April 27, 1971;

C. All about the insurance with Fireman's Fund covering my property at Modern Casting during the period for six months preceding April 27, 1971.

I further affirm that during my conversation with Mr. Forrester on April 27, 1971, it was our intention and Mr. Forrester told me such, that this proposal was for a new business and in no manner, shape or form was related to my old business. Any question that he asked me and all the answers that were given were all given with the intention of covering the new business and Mr. Forrester knew this and expressed agreement with it.

17. I respectfully ask the court that I be given the opportunity to go to trial so that I may establish that the truth and honesty for which I have been known for the last 30 years has continued and that I have never, never lied or misrepresented to the defendant herein.

There are witnesses such as the Police Department of Westwood, New Jersey which has documentation in their file which can only be produced on subpoena. They will not give affidavits. My insurance broker, who must be subpoenaed, as he will not give affidavits because he is restricted by the defendant herein.

WHEREFORE, your deponent respectfully requests that this

motion for summary judgment be denied and this matter be set down  
for an early trial.

Sworn to before me this  
*10<sup>th</sup>* day of June, 1975.

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Murray Gladstone

AFFIDAVIT OF LEO M. LAURANCE IN OPPOSITION

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

58a

MURRAY GLADSTONE,

Plaintiff,

Civil Action No.  
72 Civ. 794  
(H.F.W.)

- against -

FIREMAN'S FUND INSURANCE COMPANY,

Defendant.

AFFIDAVIT IN OPPOSITION

STATE OF NEW YORK )  
: ss.:  
COUNTY OF NEW YORK )

LEO M. LAURANCE, being duly sworn, deposes and says:

1. That your deponent is the attorney for the plaintiff herein and is fully familiar with all of the facts and circumstances. That your deponent is submitting this affidavit in opposition to the defendant's motion for summary judgment.

2. The defendant, in its moving papers, has requested that their motion for summary judgment be granted upon the grounds that the plaintiff has materially misrepresented his answers in his proposal for a jeweler's block policy. The defendant further states that it relied on such misrepresentations, all to the defendant's detriment. The defendant further alleges that by the failure of the plaintiff to comply with Section 13 of the policy issued, their noncompliance has voided the policy. The defendant further alleges, by affidavit and exhibit, that by reason of the foregoing, there is no triable issue of fact and therefore the plaintiff's complaint should be dismissed as a matter of law.

3. The plaintiff, by affirmation and documentation, has contraverted each and every issue raised by the moving papers of the defendant.

The plaintiff has point by point raised a triable issue of fact of each issue put forth by the defendant.

4. Your deponent does not desire to burden the court by realleging all that has been stated in all the other affidavits in opposition to this motion. There are one or two issues which your deponent must direct to the attention of the court.

#### BREACH OF WARRANTIES

5. The defendant, in its moving papers, concentrates solely on the answers of the plaintiff to question 11 and question 2 of the proposal and completely ignores all the other questions and answers in said proposal. Before there can be a material misrepresentation, the defendant must show that it had no prior knowledge of the facts and it must show that it relied on the alleged misrepresentations, all to their detriment.

Were the plaintiff's answers to questions 2 and 11 misrepresentations of the facts? Did the defendant know the truth to these answers on April 27, 1971? Were the answers truthful ones? What were the actual questions asked? Did the defendant rely on these answers?

To arrive at the truth to these questions, one has only to read the complete proposal as signed 4/27/71. If one reads all the answers given by the plaintiff to the proposal, they immediately see that it was the intention of both parties, that the answers given were responses only to the new business. Throughout the proposal, the answer to many questions was stated as "New business," more in particular, questions 11 and 17.

The defendant replies, "Yes," but that is the material misrepresentation which it claims.

Let us read question 11 as stated in the proposal:

"11. Property outside of our premises as set forth in question 1(c) during the last 12 months."

What is the question and answer to 1(c)?

"(c) Our premises are located at 2nd floor  
263 Center Ave., Westwood, Bergen, N.J."

One can now see it was never the intention of the parties hereto that the questions and answers on the proposal were to relate to anything else but the new business to be opened in May 1971 to be located at 263 Center Avenue, Westwood, New Jersey.

6. Question 2 may be ambiguous, but the plaintiff and the defendant both knew that the answer to that question related only to the new business to be opened at 263 Center Avenue, Westwood, New Jersey.

7. The defendant further states that it had no knowledge of the plaintiff's association with Modern Casting located at 26 West 47th Street, New York City. The defendant also states that if the aforementioned fact was known and also if the defendant knew of the plaintiff's additional travels outside of New Jersey, the premium it would have charged would have been much higher. Therefore, the defendant has been injured. The production of documentation (Ex. 10) by the plaintiff shows that the defendant knew of the other business, more in particular, Modern Casting. It shows that the defendant knew that the plaintiff's business was wholesale. It shows that the defendant knew of the plaintiff's travels. These three policies state the plaintiff's address at Modern Casting, 26 West 47th Street; the plaintiff's business as jewelry finisher, which can only be wholesale. These policies were for fire, safe burglary and hold-up.

8. If this is not sufficient documentation as to the knowledge of the defendant, I direct the attention of the court to page 1, upper left-hand corner of the proposal. Written there are the words "Modern Casting, 20 W. 47 St., N.Y.C." Mr. Forrester, by his own admission, stated that he wrote the complete proposal except the answer to question 17. If Mr. Forrester wrote

that notation in the corner of the first page, then he must have been informed only by the plaintiff as to the plaintiff's past association with Modern Casting.

If Mr. Forrester knew of this past association, therefore, the defendant knew of the past association with Modern Casting. The defendant knew of the wholesale business. The defendant knew of the travel. The defendant <sup>Knew</sup> it was never the intention of both parties that the answer to the proposal in any way reflected any other business but the new business that was to commence in May 1971.

9. Your deponent further directs the attention of the court to the plaintiff's exhibit 7. That exhibit differs from the defendant's exhibit A, more in particular question 17(a) and its answer. The plaintiff's exhibit has as its answer, 5-1-71; the defendant's exhibit has no answer. If the plaintiff's exhibit is correct, it further shows that the intention of the parties was to the new business and nothing else.

The original copy of the proposal from April 27, 1971 was always in the possession of the defendant since April 27, 1971 and therefore your deponent respectfully requests this court to direct the defendant to produce this document on the day this motion is argued.

10. Your deponent, in his memorandum of law, raises the question of estoppel as to the specific affirmative defenses of the defendant in which breach of warranties are alleged.

Assuming solely for the sake of argument, that everything that the defendant alleged in his affidavit is true; that the plaintiff misrepresented his answers to the proposal given April 27, 1971; that the defendant relied on said misrepresentations; that the plaintiff issued the defendant's Exhibit C (Proof of Loss) on June 1, 1971; that on June 8, 1971, the

defendant issued the policy; that the plaintiff paid his premium; that the defendant never returned the plaintiff's premium by reason of cancelling said policy based on the misrepresentations of the plaintiff, the defendant is estopped from asserting his affirmative defenses in relation to the plaintiff's breach of warranties. The question of estoppel is a question of fact to be decided at trial by the trier of the facts.

11. Your deponent states in his memorandum of law that the law, in the State of New Jersey, is well settled in the matter of contract where there is a material misrepresentation of fact by one party thereto and there is a reliance on said fact by the other party, all to its detriment. The injured party on the discovery of such misrepresentation has two alternatives. They may continue with the contract or they must revoke said contract and return all the consideration they received.

If the injured party decides to continue with the contract, it cannot assert the material misrepresentation in the future and thereby declare the contract null and void. If the injured party continues with the contract and waits until some time in the future to assert their claim, the injured party, by its acts, is estopped from asserting its claim or defense. This question of estoppel can only be decided at a trial by the trier of the facts.

The plaintiff, by his documentation and his affidavit and the case law of the State of New Jersey, contravenes the defendant's contention that there is no issue of fact as to the questions of breach of warranties. There are triable issues of facts and the triable issue of estoppel as to the alleged breach of warranties which only a court by trial can decide.

BREACH OF CONDITION 13 OF THE POLICY

12. As to the issues of facts whether plaintiff had breached condition 13 of the policy, the affidavits of the plaintiff and Joan Scharetta and by the documentation attached thereto, belie the defendant's statement that there are no triable issues of fact in this matter relating to the plaintiff's breach of condition 13 of the policy.

Defendant's Exhibit A plus plaintiff's Exhibits 1 through 6 contravert each issue of fact raised by the defendant in its moving papers. The defendant alleges no written notice of loss, no sworn proof of loss, no inventory of loss. On examination of the aforementioned exhibits, the plaintiff, at the very least, has substantially or completely complied with Section 13.

One has to examine plaintiff's Exhibit 13 which is a report by Theodore Ruzow dated February 7, 1972. The said Theodore Ruzow is an accountant and also an attorney at law licensed to practice law in the State of New York. The said report in no way, manner or form, raises the question of breach of warranties by the plaintiff or failure of the plaintiff to file a proof of loss, or to give a notice of loss, or fail to file an inventory of the loss. If one examines page 5 of said report, he would find that the gross purchases of \$32,175.00 was satisfactorily established. Mr. Ruzow raises a question as to the following items:

Gold Purchased	\$ 3,366.00
Stones purchased	3,800.00
Finished Jewelry	8,910.00
Purchased from Modern Casting	2,450.00

Where did Mr. Ruzow get these figures? He got them from the plaintiff. I respectfully direct the attention of the court to

plaintiff's Exhibits 1 through 6, more in particular, Exhibit 6. On comparing the four items aforementioned, we would find three of them in the first six items and "Stones purchased - \$3,800.00" under the items designated "L. Frey." If the plaintiff did not file his schedules, Mr. Ruzow could not have had all this information. On further reading Mr. Ruzow's report, the sole issue raised by him as a matter of law is the alleged inadequate bookkeeping and keeping of records. That question, as admitted by the defendant, is not at issue in this motion.

13. To arrive at the truth of the question of breach of condition 13 of the policy, we must examine all the facts that occurred after the loss. On April 27, 1971, plaintiff issued a proposal for a jeweler's block policy. A binder of insurance was issued May 7, 1971. The plaintiff opened his new business at 263 Center Avenue, Westwood, New Jersey, on May 8, 1971. On May 21, 1971, plaintiff suffered a loss. The plaintiff then gave defendant notice of said loss. On June 1, 1971, as a result of said notice, the defendant's agent, Mr. Grimm, came to the premises to discuss the matter with the plaintiff. On June 1, 1971, the plaintiff issued a proof of loss. Immediately thereafter, the plaintiff prepared and served on the defendant plaintiff's exhibits 1 through 6 which were to be attached to his proof of loss June 1, 1971. On June 8, 1971, defendant countersigned the policy and forwarded it to the plaintiff. The policy was issued 18 days after the loss, and 8 days after plaintiff had issued his "alleged proof of loss."

That some time in the middle of June, Mr. Theodore Ruzow, Certified Public Accountant for the defendant herein, communicated with the plaintiff to further examine him in reference to his notice and proof of loss. (See plaintiff's Exhibit 13.)

That from June 1971 to January 4, 1972, Mr. Grimm and Mr. Ruzow communicated and had many conferences with the plaintiff herein relating to his claim and proof of loss. The plaintiff supplied verification of each and every one of his items and the amounts thereof which he had submitted to the defendant.

The defendant negotiated with the plaintiff for eight long months. The defendant, during this period of time, never demanded, reported, informed or in any manner, told the plaintiff that the plaintiff's claim or proof of loss was faulty or had never been filed and that no notice of claim was given and that no schedules of loss were given or filed by the plaintiff. On January 4, 1972, the plaintiff met with Mr. Theodore Ruzow at his office. At that time, the plaintiff's claim was rejected and no reason for said rejection was stated. Since that time, the plaintiff has not been paid, nor has he been given any reason by the defendant, either orally or in writing, as to the reason for the defendant's rejection of plaintiff's claim.

The only reason the plaintiff now knows is by examining page 1 of plaintiff's Exhibit 13, which states the basis for said rejection, failure to keep adequate books and records, which is not in issue in this motion.

14. Your deponent has stated in his memorandum of law that the law of the State of New Jersey has repeatedly affirmed the proposition that, where assuming, no proof of loss has been filed, and no notice of loss has been given, if the carrier rejects the insured's claim and denies liability, unless the rejection and the denial is based on the failure to file proof of loss or notice of loss and the assured is notified of same, the carrier is estopped from asserting these affirmative defenses in the future.

15. The plaintiff, by both documentation and affidavit, has contraverted each and every issue of fact raised by the defendant in its moving papers for summary judgment. That as a matter of law, there are also the questions of estopping the defendant from alleging his affirmative defenses upon which this motion is based.

The issues raised by the plaintiff by affidavit and documentation are issues of fact for a court and jury. The issue of estoppel is also a question of fact for the court and jury. Both these issues can only be decided after trial by a court and the trier of the facts.

WHEREFORE, your deponent respectfully requests that this motion be denied and that this matter be set down for a speedy trial.

Sworn to before me this  
10  
9th day of June, 1975.

---

Leo M. Laurance

AFFIDAVIT OF JOAN SCHIARETTA IN OPPOSITION (Filed June 11, 1975)  
UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

67a

MURRAY GLADSTONE,

Index No. 72 Civ. 794  
(H.F.W.)

Plaintiff,

- against -

FIREMAN'S FUND INSURANCE COMPANY,

AFFIDAVIT IN OPPOSITION  
TO MOTION

Defendant.

STATE OF NEW YORK )  
: ss.:  
COUNTY OF NEW YORK )

JOAN SCHIARETTA, being duly sworn, deposes and says:

1. That from April 1971 to the end of June 1971, I was employed by Murray Gladstone, a/k/a Jewelry by Gladstone, located at 263 Center Avenue, Westwood, New Jersey.

2. My position with Mr. Gladstone was that of a book-keeper and sales person. As hereinafter indicated, I have personally prepared most of the plaintiff's exhibits attached hereto during the period covering my employment.

3. I have read the affidavits of Mr. Forrester and Mr. Hughes and my reply thereto is from my own personal knowledge and experience by being at the specific address at the given times.

4. I was present when Mr. Forrester interviewed Mr. Gladstone and prepared the aforementioned proposal for a jeweler's block policy. I heard Mr. Gladstone tell Mr. Forrester of his past experience with Modern Casting. I heard Mr. Gladstone tell Mr. Forrester about his wholesale jewelry business that existed before Mr. Gladstone entered into the business located at 263 Center Avenue, Westwood, New Jersey. I heard all the responses given by Mr. Gladstone to Mr. Forrester as answers to the questions asked of Mr. Gladstone and the responses were not as Mr. Forrester

indicates and states in his affidavit. Mr. Gladstone told him about Modern Casting and his wholesale business. Mr. Forrester kept on saying as the questioning was proceeding, "New business, new business."

5. After the store was opened on May 7, 1971, I started to prepare an inventory book (Plaintiff's Exhibit 1) in which I started to enter all the goods that had been purchased or manufactured for Mr. Gladstone before he opened the store. I also entered into this ledger all goods purchased after the store was opened. On each page of said ledger was entered a different supplier. On each supplier's page was entered the specific goods purchased from him, item by item, and the price thereof and date of bill. On each supplier's page as sales were made of their items, I would enter said sales and deduct said items from the inventory of said supplier.

6. I was present on June 1, 1971 when Mr. Grimm came to the store located at 263 Center Avenue, Westwood, New Jersey. As he talked with Mr. Gladstone on that day, I started to work with the gentlemen that came with him. We commenced taking an inventory of all the merchandise remaining in the store after the robbery. This inventory was put on separate sheets for each supplier, as per my inventory book. (Plaintiff's Exhibit 2) After we finished, I then showed them copies of all our suppliers. (Plaintiff's Exhibit 3) I then showed them copies of the sales book showing all the sales made from May 7, 1971 to date of robbery.<sup>(Ex. 4)</sup> They then compared the above records with my entries in my inventory book.

After I was finished, I joined Mr. Gladstone and Mr. Grimm as they were about to finish their business. I heard Mr. Grimm after awhile ask Mr. Gladstone, "Are these statements that you have just written true?" Mr. Gladstone responded, "I swear

they are true."

A short time thereafter, Mr. Grimm and the two gentlemen that came with him were departing when Mr. Grimm assured Mr. Gladstone that everything was in order and that all he needed was photocopies of plaintiff's Exhibits 1, 3 and 4.

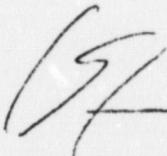
7. A short time thereafter, I started to prepare for the Police Department plaintiff's Exhibit 5. After that was finished, I served it on the Police Department and forwarded a copy of it to the insurance company, and at the same time enclosing therewith copies of plaintiff's Exhibits 1, 3 and 4 and 6.

8. I have examined and herewith state that I helped the plaintiff prepare plaintiff's Exhibit 6, by using my inventory book, the bills of purchase of the plaintiff, the bills of sales by the plaintiff and the inventory remaining after the robbery.

9. I am presently employed by Revlon, Inc. as a beauty consultant, but I would gladly appear in court to testify so that I can substantiate, under oath and cross-examination all the statements I have heretofore made.

Sworn to before me this

10 day of June, 1975.



Joan Scharetta

**EXHIBITS ANNEXED TO FOREGOING AFFIDAVIT**

**EXHIBIT 7 - PROPOSAL FOR JEWELERS' BLOCK POLICY**  
**PROPOSAL FOR JEWELERS' BLOCK POLICY**  
 TO BE EFFECTED WITH

70a  
IM 2209  
(Ed. 4-69)



**FIREMAN'S  
FUND  
AMERICAN  
INSURANCE COMPANIES**

FIREMAN'S FUND INSURANCE COMPANY  
 THE AMERICAN INSURANCE COMPANY  
 NATIONAL SURETY CORPORATION **DEPT. EXH. 1 FOR ID.**  
 ASSOCIATED INDEMNITY CORPORATION  
 AMERICAN AUTOMOBILE INSURANCE COMPANY

DATE 6-27-72

J. ADLER

*J. Adler*

This proposal must be completed and signed in duplicate. One signed copy, together with signed supplementary information, if any, will be attached to the policy.

Quotations cannot be given on incomplete proposals. If the answer to any question is none, state "NONE" or "NIL".

The answers to questions 2, 11a, 11c, 11d, 17c and 17d must be based on the 12 months period immediately preceding the date of this proposal.

1. a. Our firm or corporation name is *Harley Jewelers Inc.*

b. The names of the individual members of our firm or of the officers of our corporation are *Harley E. Adler*

c. Our premises are located at *2nd floor 2636 California Street, San Francisco, Calif.*

Floor

Street number

City

County

State

2. NATURE OF OUR BUSINESS BASED ON SALES: Manufacturing **100%** Wholesale **0%** Retail **0%** Importing **0%**

3. EMPLOYEES: a. How many employees have you? **1** b. What is the least number of employees on your premises at any time during business hours or when opening or closing for business?

4. LOSSES: Give statement covering all losses (insured or uninsured) during the past 5 years involving property damage to your premises under any insurance policy, with dates, nature of loss and amount, name of insurer, and whether paid in full or otherwise.

*No*

5. Within your knowledge has any insurer ever canceled or refused to issue or to continue any insurance for you? **Yes**  
Give particulars.....

6. BOOKKEEPING: a. Do you keep a detailed stock record by nature of stock and value? **Yes** b. How often do you take physical inventory? **Monthly**

7. JEWELERS' SECURITY ALLIANCE: Are you a member of the Jewelers' Security Alliance? **Yes**

8. AMOUNT(S) OF INSURANCE DESIRED

a. On Stock (including other people's goods)	\$
b. On Money in Locked Safe at Proposer's premises against Theft by safe being broken open	\$
c. On Patterns, Molds, Models and Dies at Proposer's premises	\$
d. On Furniture, Fixtures, Tools, Machinery and Fittings at Proposer's premises	\$ <b>4</b>
e. On Tenant's interest in Improvements and Betterments of Building(s)	\$ <b>1</b>

Note: Insurance on items 8 d. and e. may not be less than 80% of estimated value stated in answer to Question 18. The amounts indicated above are merely indications and are not to be considered as either increasing or diminishing the amounts for which the policy is issued.

9. What limits do you desire for clause 2 of this policy:

Clause 2 (B) \$ **2500** Clause 2 (C) \$ **2500** Clause 2 (D) \$ **112** Clause 2 (E) \$ **2500**

10. OPTIONAL COVERAGES AND PROVISIONS:

a. Do you wish to EXCLUDE Fire and Lightning on property at premises referred to in answer to Question 1 c?  Yes  No

b. Do you wish to cover at premises referred to in answer to Question 1 c:

- (1) Flood?  Yes  No. (If "yes", full particulars of flood exposure to be furnished.)
- (2) Earthquake? (Available only when fire and lightning are not excluded.)  Yes  No.

c. Do you wish deductible coverage?  Yes  No. If "yes", check one:  \$500.  \$1,000.  \$2,500.  \$5,000.

**Property outside of our Premises as set forth in Question 1 c during the last 12 months:**

a. In the custody or control of the Proposer, Employees, Members of the Firm or Officers of the Corporation or Salesmen:  
 1. In cities or towns in which the Proposer's premises are situated.

71a

NAME	Number of Days	Average Amount	Maximum Amount
Florida - Hotel Reservations			
2. Elsewhere in the states of United States, the District of Columbia, Canada and Puerto Rico.			
Florida - Hotel Reservations			
3. Elsewhere.			

b. THE NAMES AND HOME ADDRESSES OF THE PROPOSER, EMPLOYEES, MEMBERS OF THE FIRM OR OFFICERS OF THE CORPORATION OR SALESMEN who may have property in excess of \$5,000.00 in their custody or control outside of the Proposer's premises:

**NAME**

**HOME ADDRESS**

c. The estimated average daily amount of property in the custody or control of others, except as provided in answer to Questions 11a, 11b, 11c and 16b during the last 12 months was \$ and cents. ~~including~~ ~~new~~ ~~less~~ ~~on~~  
**IMPORTERS:** Include values of property in the custody of United States Customs, appraisers' stores and custom house brokers.

**IMPORTERS:** Include values of property in the custody of United States Customs, appraisers' stores and custom house brokers.

d. **SHIPMENTS:** The TOTAL AMOUNT of property shipped AT OUR RISK during the last 12 months did not exceed: *\$15,000.00*

1. SURFACE SHIPMENTS BY FIRST CLASS REGISTERED MAIL AND RAILWAY EXPRESS  
(1) Within the limits of: (a) the states of the United States (excluding Alaska and Hawaii), the District of Columbia and Canada (in and between); (b) Alaska; (c) Hawaii; (d) Puerto Rico \$..... (2) Between the above places \$.....
2. SHIPMENTS BY ARMORED CAR.....\$.....
3. AIR SHIPMENTS BY FIRST CLASS REGISTERED AIRMAIL AND AIR EXPRESS, DIVISION OF RAILWAY EXPRESS  
(1) Within the limits of: (a) the states of the United States (excluding Alaska and Hawaii), the District of Columbia and Canada (in and between); (b) Alaska; (c) Hawaii; (d) Puerto Rico \$..... (2) Between the above places \$.....
4. ALL OTHER SHIPMENTS COVERED BY POLICY. (See Clause 5(E)) \$.....

**SHOW WINDOW DISPLAY AT PREMISES (INCLUDING OUTSIDE SHOW CASE DISPLAY ON PREMISES) OCCUPIED BY PROPOSER.**

**Note:** Property displayed in show windows, and in show cases not opening into the interior of the premises, is considered "protected" only when it is displayed behind swinging plateglass (or its equivalent) secondary to windowpane or behind metal bars or grille entirely across window or show case, or behind shatterproof glass, or in a show case within the window.

a. Number of Show Windows (opening into the interior of the premises). 16.67% How many are protected against window smashing and how? \_\_\_\_\_

Number of Outside Show Cases 612. Describe cases and location.

How many are protected against

How are they protected against forcible entry?

b. During the term of Insurance, the maximum value displayed will not exceed:	PREMISES OPEN TO BUSINESS		PREMISES CLOSED TO BUSINESS	
	Protected	Unprotected	Protected	Unprotected
(1) in all windows and outside show cases	\$ .....	\$ .....	\$ .....	\$ .....
(2) in any one window	\$ .....	\$ .....	\$ .....	\$ .....
(3) in any one outside show case	\$ .....	\$ .....	\$ .....	\$ .....

## 13. SHOW CASE AND SHOW WINDOW DISPLAYS OF PROPRIETOR NOT AT PREMISES OCCUPIED BY PROPRIETOR.

If Proprietor desires insurance on property displayed in show cases or show windows in building lobby or elsewhere than at premises occupied by Proprietor, furnish full particulars of each display. 72a

## 14. PREMISES PROTECTION

## a. ELECTRICAL BURGLAR ALARM SYSTEMS

Are your premises protected by an operating Mercantile Premises Alarm System?  Central Station?  Local Alarm?

Extent of Protection (1, 2 or 3).  Grade (AA, A, B or C).

Name of Protective Company *Electron Security Systems, Inc.* *Holder of Certificate No. 111-123456789*

Underwriters' Laboratories Certificate No. *111-123456789* Date of Expiration *10/20/68*

## b. HOLDUP ALARM AND PROTECTIVE SYSTEMS

Is there a Central Station Holdup Alarm System protecting your premises?  Number of Signal Buttons *82*

## c. WATCHMAN SERVICE

(1) State number of watchmen employed exclusively by you (or, if Proposal is for a leased department of a Department Store, then exclusively by the Department Store) and maintained on duty within your premises at all times when not regularly open to business *16*

(2) Do such watchmen report or register at least hourly on weekdays, and each two hours on Sundays and holidays (a) to an outside Central Station?  (b) on a Watchman's Clock?

## 15. SAFES AND VAULTS

a. Give full particulars of each safe or vault.

<i>100-12345</i>	<i>NO. 1</i>	<i>NO. 2</i>
<i>Electron Safe Co., Inc.</i>		
<i>6-12345</i>		
<i>Central Station</i>		
<i>Electron Safe Co., Inc.</i>		
<i>6-12345</i>		
<i>Central Station</i>		

b. PROTECTIVE DEVICES BEARING UNDERWRITERS' LABORATORIES LABEL OR WITH UNEXPIRED CERTIFICATE, TIME LOCK AND RELOCKING DEVICE

Give full particulars

Name.....	Name.....
.....	.....
.....	.....
U. L. Cert. No.....	U. L. Cert. No.....
Expiration.....	Expiration.....
Name.....	Name.....
Central Station..... Local.....	Central Station..... Local.....
U. L. Cert. No.....	U. L. Cert. No.....
Grade (AA, A, B or C).....	Grade (AA, A, B or C).....
Expiration.....	Expiration.....
Name.....	Name.....
Central Station..... Local.....	Central Station..... Local.....
U. L. Cert. No.....	U. L. Cert. No.....
Grade (AA, A, B or C).....	Grade (AA, A, B or C).....
Expiration.....	Expiration.....

Note: If the answers to Questions a, b and c above are not identical for each safe or vault, the following section MUST be completed

d. Indicate minimum proportion by value of property on premises kept in each safe or vault at all times when premises are closed

Total to agree with 16 a (1) and (2). %

## 16. WARRANTIES AS TO PROPERTY INSURED DURING TERM OF INSURANCE AT ALL TIMES WHEN PREMISES ARE CLOSED:

(Note: This section refers only to property described in Section 3 of this policy.)

a. If more than one premises give details at each.

(1) The minimum proportion by value of property on premises kept in Locked Safes and Vaults protected as indicated under 15b will be

" " "	" 15c (1) will be	%
" " "	" 15c (2) will be	%

(2) The minimum proportion by value of property on premises kept in other Locked Safes and Vaults will be

75	%
----	---

(3) The maximum proportion by value of property on premises (including window display) out of Safes and Vaults will be

25	%
----	---

b. (1) The minimum proportion by value of property kept in Safe Deposit Vault of

(Each Column to Total 100%)

No stock reported  
in Sec. 17 to be  
excluded from  
insurance

Complete if any  
stock included in  
Sec. 17 is to be  
excluded



## EXHIBIT 3 - NOTICE OF LOSS

2 DE COMPANY

Fireman's Fund

AGENCY NAME, STREET ADDRESS (RUBBER STAMP OR TYPE)

W.M.Ross and Company, Inc.  
36 Upper Montclair Plaza  
Upper Montclair, N.J.

INSURED

Murray Gladstone d/b/a Jewelry by Gladstone  
PROPERTY ADDRESS

263 Center Street, Westwood, N.J.  
MAIL ADDRESS (if different)

PHONE NO.

PHONE NO.

LOSS LOCATION IF DIFFERENT THAN PROPERTY ADDRESS

ALLIED LINES AND MULTIFIL POLICIES Complete below only item(s) involved in Loss as described by this Policy

Amount Building	Amount Contents	Amount Other Items	Percent of Coins Applicable
\$	\$	\$	\$

\* Coverage and/or Description of Property Insured

Jewelers block

SUBJECT TO FORM NUMBERS (INSERT FORM NUMBERS AND EDITION DATES)

Deductible Windstorm and Hail	Deductible Other Perils	Deductible Misc. (Explain)
\$	\$	\$

OWNERS POLICIES Complete below Coverages A, B, C, D and Additional Coverages, except liability

COVERAGE A	COVERAGE B	COVERAGE C	COVERAGE D	DESCRIBE ADDITIONAL COVERAGES PROVIDED
Dwelling	Appurtenant Private Structures	Unscheduled Personal Property	Additional Living Expenses	\$ 00
\$	\$	\$	\$	\$ 00

SUBJECT TO FORM NUMBERS (INSERT FORM NUMBERS AND EDITION DATES)

Deductible Windstorm and Hail	Deductible Other Perils	Deductible Misc. (Explain)	Percent of Coinurance Applicable
\$	\$	\$	%

OTHER INSURANCE (LIST NAMES OF COMPANIES AND AMOUNT IN EACH)

REMARKS: Brief Description of Damage (If emergency handling required, explain why)

8 A.M. heard a knock on door opened up and had a gun put to his head and was forced to a closet and told not to make a sound. Safe was opened so most of contents taken after 10 to 15 minutes not hearing anything came out. Notified police at 9:26.

LEAVE SPACE BELOW FOR COMPANY USE ONLY

C. J. Smith - CJS, Genl.  
COPIES SENT TO [Signature] Home or Dept. Office General Agent Fieldman by phone  
5/24/71

NOTICE TO AGENTS: \* Insert amount of insurance in appropriate column to the left. Description of covered may be abbreviated Policy, i.e., Additional Living Expenses - AL.E., Flood - F.D., Stock - S.K., Yard Features - Y.F., Errors & Omissions - E.O., Live Stock - L.S., Machinery Breakdown - M.B.E., Firearm Liability on a policy after a loss - F.L.L. \* Do not commit the Company to an action or line of action unless specifically instructed to do so. USE OF TRADE NAMES AND TRADE MARKS IS PROHIBITED BY THE AMERICAN INSURANCE ASSOCIATION - AIA

## EXHIBIT 9 - POLICY ISSUED TO PLAINTIFF

75a

PRODUCER'S CODE

NAME AND LOCAT

PREVIOUS POLICY NO

29 013 766

W.M. ROSS &amp; CO.

NEW

JB 100 57 92

01 Coverage is provided in the Company designated by number,  
a stock insurance Company (herein called the Company)

INSURED'S NAME AND ADDRESS (NO., STREET, TOWN, COUNTY, STATE)

MURRAY GLADSTONE  
T/A JEWELRY BY GLADSTONE  
263 CENTER AVE.  
WESTWOOD, N.J.

5-7-71

5-7-72

INCEPTION (MO. DAY YR.)

EXPIRATION (MO. DAY YR.)

AT NOON, STANDARD TIME AT PLACE OF ISSUANCE



W. M. ROSS AND COMPANY, INC.  
GENERAL INSURANCE

UPPER MONTCLAIR PLAZA  
UPPER MONTCLAIR, NEW JERSEY  
201-783-4800

## SCHEDULE OF PROPERTY AND AMOUNTS INSURED, SUBJECT TO THE LIMITATIONS AND CONDITIONS HEREINAFTER CONTAINED

ON STOCK (AND OTHER PEOPLE'S GOODS)	ON PATTERNS, MOLDS, MODELS, DIES	ON TENANT'S IMPROVEMENTS AND INTERESTMENTS
\$ 35,000 PER BASIC POLICY	\$ NIL PER ENDORSEMENT	\$ 1,000 PER ENDORSEMENT
ON MONEY (IN LOCKED SAFES)	ON FURNITURE, FIXTURES, MACHINERY, TOOLS, FITTINGS	TOTAL POLICY AMOUNT
\$ 1,000 PER ENDORSEMENT	\$ 4,000 PER ENDORSEMENT	\$ 41,000

1. IN CONSIDERATION OF THE PREMIUM SPECIFIED, AND OF THE PROPOSAL AND DECLARATIONS DATED (SHOWN BELOW), ATTACHED HERETO AND MADE A PART HEREOF AND WHICH IS (ARE) HEREBY AGREED TO BE THE BASIS OF THIS POLICY, AND WHEREBY THE INSURED HEREBY WARRANTS IT BE TRUE AS TO EACH AND EVERY STATEMENT AND PARTICULAR CONTAINED THEREIN, THE COMPANY DOES INSURE THE INSURED NAMED ABOVE, HEREIN CALLED THE INSURED, WHOSE ADDRESS IS SHOWN ABOVE AND WHOSE PREMISES ARE LOCATED AT (SHOWN BELOW) FROM THE INCEPTION DATE ABOVE TO THE EXPIRATION DATE ABOVE.

DATE OF ATTACHED PROPOSAL AND DECLARATION

4-27-71

INSURED'S PREMISES ADDRESS

2ND. FLOOR OF 263 CENTER AVE.  
WESTWOOD, N.J.

802.

S

## LIMITATIONS OF LIABILITY

2. THE MAXIMUM LIABILITY OF THE COMPANY RESULTING FROM ANY ONE LOSS, DISASTER OR CATASTROPHE IS LIMITED AS FOLLOWS:

(A) \$ 35,000 IN RESPECT OF PROPERTY AT THE INSURED'S PREMISES AS DESCRIBED HEREIN

(B) \$ 5,000 IN RESPECT OF PROPERTY WHICH IS IN TRANSIT BY FIRST CLASS REGISTERED AIR MAIL OR AIR EXPRESS SUBJECT TO THE STIPULATIONS OF EXCLUSION (E) OF SECTION 5, OR BY AIR SPEED CAR, TRUCK, VAN, BUS, TAXI, CARRIED IN AN AUTOMOBILE, POSITIONED IN THE SAFE OR VAULT OF A BANK OR SAVINGS DEPOSIT COMPANY, OR IN THE CUSTODY OF A PERSON EMPLOYED BY OR ASSOCIATED WITH THE INSURED, OR IN THE PROPERTY OF THE KING INSURED HEREUNDER NOT EMPLOYED BY OR ASSOCIATED WITH THE INSURED, OR IN THE PROPERTY DEPOSITED FOR SAFE KEEPING WITH SUCH A DEALER BY THE INSURED, OR IN THE TRUNK OF AN AUTOMOBILE, OR IN THE POSSESSION OF THE INSURED'S AGENTS OR REPRESENTATIVES WHILE TRAVELING IS SUBJECT TO THE LIMIT EXPRESSED IN CLAUSE (E) OF THIS SECTION.

(C) \$ 2,500 IN RESPECT OF SHIPMENTS IN TRANSIT BY FIRST CLASS REGISTERED AIR MAIL OR AIR EXPRESS SUBJECT TO THE STIPULATIONS OF EXCLUSION (E) OF SECTION 5 SENT TO ANY ONE ADDRESSEE AT ANY ONE ADDRESS DURING ANY ONE DAY.

(D) \$ NIL IN RESPECT OF SHIPMENTS IN TRANSIT BY CUSTOMER PARCEL DELIVERY SERVICE AND THE PARCEL TRANSPORTATION SERVICE OF RAILROADS, WATERBORNE OR AIR CARRIERS AND PASSENGER BUS LINES SUBJECT TO THE STIPULATIONS OF EXCLUSION (E) OF SECTION 5.

(E) \$ 2,500 IN RESPECT OF PROPERTY ELSEWHERE AND NOT INCLUDED IN CLAUSES (A), (B), (C) AND (D) ABOVE OR OTHERWISE LIMITED HEREIN.

## PROPERTY INSURED

The Property Insured is as follows:

(F) Pearls, precious and semi-precious stones, jewels, jewelry, watches and watch movements, gold, silver, platinum, other precious metals, and alloys and other articles usual to the conduct of the Insured's business, owned by the Insured.

Property as above described, delivered or entrusted to the Insured by others who are not dealers in such property or otherwise engaged in the jewelry trade.

Property as above described, delivered or entrusted to the Insured by others who are dealers in such property or otherwise engaged in the jewelry trade, but to the extent of the Insured's own actual interest therein because of money actually advanced thereon, or legal liability for loss of or damage thereto.

ENDORSEMENTS ATTACHED

135189 135169 135179 135191

(Continued on Page Two)

DATE OF ISSUE

6-8-71 LV

CO-OPERATOR'S SIGNATURE OR AUTHORIZED AGENT

W. B. Boller

JB 100  
57  
92

## TERRITORIAL LIMITS

The property described above is covered while within or in transit between the states of the United States, District of Columbia, Puerto Rico and Canada, but subject ways to the limitations, conditions, exclusions and exceptions stated herein.

## INSURING CONDITIONS

This policy insures against all risks of loss of or damage to the above described property arising from any cause whatsoever except:

(1) Loss, damage or expense caused by or resulting from sabotage, theft, conversion or other act or omission of a dishonest character (1) on the part of the insured or his or their employees, or (2) on the part of any person to whom the property hereby insured may be delivered or entrusted by whomsoever for any purpose whatsoever, unless such loss arises while the goods are deposited for safe custody by the Insured, officer of the corporation, member of the firm or salesmen while traveling, or while the goods are in the custody of (a) the Post Office Department as first class registered mail, or (b) a carrier mentioned in Section 2, or (c) person serving as a mere porter or helper at on the payroll of the Insured.

(2) Loss or damage caused by delay, loss of market, gradual deterioration, insect, vermin, inherent vice, corrosion, rust, dampness of atmosphere, freezing or extremes temperature or insufficient or defective packing; or damage sustained while the property is being actually worked upon and directly resulting therefrom.

(3) Loss or damage caused by or resulting from:

(a) hostile or warlike action in time of peace or war, including action in hindering, combating or defending against an actual, impending or expected attack;

(b) by any government or sovereign power (de jure or de facto), or by any authority maintaining or using military, naval or air forces; or (b) by military, naval or air forces; or (c) by an agent of any such government, power, authority forces;

(d) any weapon of war employing atomic fission or radioactive force whether in time of peace or war;

(e) insurrection, rebellion, revolution, civil war, usurped power, or action taken by governmental authority in hindering, combating or defending against such an occurrence, seizure or destruction under quarantine or Customs regulations, conviction by order of any government or public authority, or risks of contraband illegal transportation or trade.

(D) Loss or damage occurring at the Insured's premises caused by or resulting from:

(1) Earthquake;

(2) Flood, surface water, waves, tidal water or tidal wave, overflow of streams or other bodies of water or spray from any of the foregoing all whether driven by wind or not.

However, if the peril of fire is not excluded hereunder this policy will cover fire damage occurring during or resulting from perils enumerated in (1) and (2).

(E) Loss or damage occurring in course of transit to shipments by:

(1) mail unless registered first class;

(2) express unless by railway express (including air division thereof) provided, however, that as respects shipments sent by the Insured, its officers, agents, servants or employees, the following special conditions apply:

(a) a special declaration of value is to be made to the carrier of not less than 10% of the actual value of the contents of a package of a value of \$1,000. or more. In no case need such declared value exceed \$5,000. and

(b) a package of a value of \$1,000. or more containing property consisting in whole or in part (manufactured or unmanufactured) of pearls, precious and semi-precious stones, gold, silver, platinum, other precious metals and alloys, watches, watch cases and movements, is not covered unless sealed with wax or lead (or other sealing method approved by the carrier for use by the Insured) and shipped in the carrier's Money Classification;

(F) railroad, waterborne or air carriers unless under receipt of their passenger parcel transportation or baggage services. Property placed in the custody of air carriers' passenger baggage service for transportation under air freight tariff with delivery to the passenger at destination shall be considered as accompanied baggage and subject to the limitation of Section 2 (E);

(G) motor carriers or truckmen other than under receipt of:

(a) those operating exclusively as a customer parcel delivery service (including air division thereof in accordance with its tariff);

(b) armored car service;

(c) the parcel transportation or baggage services of passenger bus lines.

(H) Breakage of articles of a fragile or brittle nature, unless caused by fire, lightning, explosion, aircraft, vehicles, flood, earthquake, a riot, storm, strikers, rioters, persons taking part in labor disturbances or civil commotions, bandits, thieves or incident to the conveyance in which the property insured is being carried (but only when and to the same extent that such perils are otherwise covered under this policy).

(I) Loss or damage to goods sold on the installment plan from the time they leave the Insured's custody.

(J) Loss or damage while the property is being worn (except with the written consent for the purpose of adjustment) by the Insured, officer of the corporation, member of the firm, director, agent, employee, servant or messenger of the Insured, or by any dealer or other person, firm or corporation engaged in the passing of goods by any of their officers, directors, agents, employees, servants or messengers or by

any member of the family, relative or friend of any of the aforesaid, or while in their custody for such purpose.

(K) Loss or damage to property insured hereunder while in or upon any automobile, motorcycle or any other vehicle unless, at the time the loss occurs, there is actually in or upon such vehicle, the Insured or a permanent employee of the Insured, or a person whose sole duty it is to attend the vehicle. This exclusion shall not apply to property in the custody of a carrier mentioned in Section 2 hereof, or in the custody of the Post Office Department as first class registered mail.

(L) Loss or damage to the property hereby insured while at any exhibition promoted or financially assisted by any Public Authority or by any Trade Association.

(M) Loss or damage to property contained in show windows at the Insured's premises by theft or attempted theft accomplished by or resulting from the smashing or cutting of such windows except as may be endorsed hereon.

(N) Loss or damage exhibited by the Insured in show cases or show windows elsewhere than at the premises of the Insured as referred to in this policy except as may be endorsed hereon.

(O) Unexplained loss, mysterious disappearance or loss or shortage disclosed on taking inventory. Nor shall this policy cover any shortage in goods claimed to have been forwarded in a package when the package is received by the Insured in apparent good order with seals unbroken; nor for loss of or damage to goods represented "C.O.D." with the privilege of inspection by the consignee before delivery.

(P) Loss by nuclear reaction or nuclear radiation or radioactive contamination, all whether controlled or uncontrolled, and whether such loss be direct or indirect proximate or remote, or in whole or in part caused by contribution or aggravated by the peril(s) insured against in this policy; however, subject to the foregoing and all provisions of this policy, direct loss by fire resulting from nuclear reaction or nuclear radiation or radioactive contamination is insured against in this policy.

6. To the extent of 10% of the limit of liability stand in Section 2 as applied to such premises, the Company will pay for damage (except by fire) to the extent of the building occupied by the Insured directly or indirectly, or to any part thereof, provided the Insured is the owner of such premises or is lawfully in possession of such damage; but in no event shall this section apply to damage to the interior or ornamentation thereon. The Company's liability under Item (A) of Section 2 and under Item (A) of Section 2 shall not exceed the limit of liability stand in Section 2 and under Item (A) of Section 2 for the premises at which such loss or damage occurs.

7. Unless endorsed hereon, no assignment of or change of interest under this policy shall bind the Company, nor shall coverage apply to additional lot, lots or the Insured or to changes in or additions to the premises of the Insured referred to in Section 1. No agreement, condition, or declaration on this policy shall be waived or changed, nor shall notice to, or knowledge possessed by any agent or any other person be held to effect a waiver or change in any part of this policy unless endorsed hereon.

8. It is a condition of this insurance that:

(A) The Insured will maintain a detailed and itemized inventory of his or their property and separate listing of all trailers' stocks in such manner that the exact amount of loss can be accurately determined therefrom by the Company.

(B) The Insured will maintain during the life of this policy, invoices is within his or their control, watchmen and the productive crews as described in Item (A) of their proposal form or in endorsements attached hereto.

9. (A) The Company shall not be liable beyond the actual cash value of the property at the time of any loss or damage and the loss or damage will be ascertained or estimated according to such actual cash value with proper deduction for depreciation, however caused, and shall in no event exceed the lowest figure of the value of such property in the Insured's inventories, stock books, stock papers or account books at the time the loss occurred, nor the cost to repair or replace the property by material of like kind and quality. Any antiques or historical article, whether or not in the said property shall be excluded from the estimate of loss or damage.

(B) Claims in respect of loss or of damage to pledged articles shall be limited to the amount actually loaned and unpaid plus the interest thereon at the rate accrued at date of loss.

10. In the event of loss of or damage to property of others behalf for which claim is made upon the Company, the right to adjust such claim with the owner or owners of the property is retained to the Company. Such claim of such owner or owners in satisfaction of or shall be in full discharge of the claim of the Insured for which such payment has been made, if the Company be taken to enforce a claim against the Insured as respects any such property, the Company reserves the right at its option without expense to defend and conduct the defense on behalf of and in the name of the Insured, and the action of the Company in such regard shall increase the liability of the Insured under this policy, nor increase the limits of liability specified in this policy.

77a

(Continued from Page Two)

It is understood and agreed that any insurance granted herein shall not cover (excepting as to the legal liability of the Insured), when there is any other insurance which would attach if this policy had not been issued, whether such insurance be in the name of the Insured or of any third party. It is, however, understood and agreed, that if under the terms of such other insurance (in the absence of this policy) the liability would be for a less amount than would have been recoverable under this policy (in the absence of such other policy) then this policy attaches the difference.

This insurance shall in nowise inure directly or indirectly to the benefit of any heir or other bailee.

In the event of loss or damage, or of anything likely to result in a claim under this policy, the Insured shall give immediate notice in writing to the Company, of the property from loss or damage, furnish a complete list of the lost or damaged property stating the market value and cost of each article and the amount paid thereon; and the Insured shall within sixty (60) days after a loss (unless time is extended in writing by the Company), render to the Company a proof signed and sworn to by the Insured, stating the knowledge and belief of the Insured as to the following: The time and cause of the loss or damage; the interest of the Insured and of all others in the property affected; the cash value of each thereof, and the amount of loss of or damage thereto; all encumbrances on all other contracts of insurance, whether valid or not, covering any of the property and shall furnish a copy of all the descriptions and schedules in all insurance policies if required.

The Insured, as often as may be reasonably required, shall exhibit to any person designated by the Company all that remains of any property herein described, shall submit, and in so far as is within his or their power cause his or their heirs, members of the household and others to submit to examinations under oath, any person named by the Company and subscribe the same; and, as often as may be reasonably required, shall produce for examination all writings, books, account bills, invoices and other vouchers, or certified copies thereof if originals are at such reasonable time and place as may be designated by the Company representative, and shall permit extracts and copies thereof to be made. An examination under oath or examination of books or documents, nor any act of the Company or any of its employees or representatives in connection with the investigation of any loss or claim hereunder, shall be deemed a waiver of defense which the Company might otherwise have with respect to any loss or damage, but all such examinations and acts shall be deemed to have been made without prejudice to the Company's liability.

There can be no abandonment to the Company of any property.

All adjusted claims shall be paid or made good to the Insured within sixty (60) days after presentation and acceptance of satisfactory proof of interest and loss at office of the Company. No loss shall be paid or made good if the Insured has received the same from others.

In the event of loss or damage the Insured shall acquire any right of action against any individual, firm or corporation for loss of, or damage to, property hereunder, the Insured will, if requested by the Company, assign and transfer such claim or right of action to the Company or, at the Company's option, file and deliver to the Company the customary form of loan receipt upon receiving advance of funds in respect of the loss or damage, and will subordinate the same to, or will hold in trust for the Company, all such rights of action to the Company for the amount paid or advanced, and will permit suit to be brought in the Company's name under the direction of and at the expense of the Company.

This policy is made and accepted subject to the foregoing provisions and stipulations, together with such other provisions, stipulations and agreements as may be added to or deleted from this policy.

In witness Whereof, the Company has executed and attested these presents, but this policy shall not be valid unless countersigned by a duly authorized agent of the Company at the agency hereinbefore mentioned.

*Robert P. J. Conroy*

SECRETARY

*Fred A. Mead?*

PRESIDENT

SPECIAL STATE PROVISIONS

18. Suit. If this policy is issued in the State of Kansas, the words "five (5) years" are substituted for the words "twelve (12) months" in Condition 11.

Notice of Loss and Suit. If this policy is issued in the State of Texas, the words "ninety one (91)" are substituted for the word "ninety (90)" in Condition 11, and the words "two (2) years and one (1) day" are substituted for the words "twelve (12) months" in Condition 11.

78a

**DEDUCTIBLE CLAUSE ENDORSEMENT**  
(Jewelers' Block)

DEDUCTIBLE AMOUNT (INSERT \$500, \$1,000, \$2,500 OR \$5,000)

\$ 500.

In consideration of the reduced premium charged, each claim for loss or damage (separately occurring), except as hereinafter provided, shall be adjusted separately and from the amount of each adjusted claim or the applicable limit of liability, whichever is less, the sum shown above shall be deducted.

This deductible shall not apply to loss or damage caused by fire or lightning at the premises of the Insured as referred to in this policy. It is a condition of this policy that the deductible specified above shall be solely at the risk of the Insured, and shall not be covered under any other policy of insurance effected in the name of the Insured.

In the event of any recovery or salvage on a loss which has been or is being or is about to be paid hereunder, such recovery or salvage shall accrue entirely to the benefit of the Company under this policy until the sum paid by them has been made up.

POLICY NUMBER	INSURED	EFFECTIVE
JB 100 57 92	T/A JEWELRY BY GLADSTONE	5-7-71
FIREMAN'S FUND INSURANCE COMPANY THE AMERICAN INSURANCE COMPANY NATIONAL SURETY CORPORATION ASSOCIATED INDEMNITY CORPORATION AMERICAN AUTOMOBILE INSURANCE COMPANY	W.M. ROSS & CO. COUNTERSIGNATURE OF AUTHORIZED AGENT	PRODUCER
<i>Fred H Merrill</i> PRESIDENT	<i>W. Bobde</i>	70-X

135169-4-67

**AMENDATORY ENDORSEMENT — JEWELERS' BLOCK POLICY**

Sections 5(E)(2)(a) and (b) are amended to read:

(a) A special declaration of value is to be made to the carrier of not less than 25% of the actual value of the contents of a package; and

(b) A package of a value of \$1,000 or more containing property consisting in whole or in part (manufactured or unmanufactured) of pearls, precious and semi-precious stones, gold, silver, platinum, other precious metals and alloys, watches, watch cases and movements, is not covered unless sealed with wax or lead (or other sealing method approved by the carrier for use by the Insured) and, as respects surface shipments only, shipped in the carrier's Money Classification.

Otherwise this policy remains unchanged.

POLICY NUMBER	INSURED	EFFECTIVE
JB 100 57 92	T/A JEWELRY BY GLADSTONE	5-7-71
FIREMAN'S FUND INSURANCE COMPANY THE AMERICAN INSURANCE COMPANY NATIONAL SURETY CORPORATION ASSOCIATED INDEMNITY CORPORATION AMERICAN AUTOMOBILE INSURANCE COMPANY	W.M. ROSS & CO. COUNTERSIGNATURE OF AUTHORIZED AGENT	PRODUCER
<i>Fred H Merrill</i> PRESIDENT	<i>W. Bobde</i>	70-X

135179-7-67

**SUPPLEMENTAL COVERAGE ENDORSEMENT  
(JEWELERS' BLOCK)**

79a

In consideration of the premium shown in the Schedule and subject otherwise to all of its terms, conditions and exclusions, this policy is extended to cover for not exceeding the amount(s) shown in the Schedule:

## SCHEDULE

**PREMIUM \$ INCLUDED**

**Patterns, Molds, Models and Dies:** While within the premises of the Insured listed in the Schedule.

**Furniture, Fixtures, Tools, Machinery and Fittings:** While within the premises of the Insured listed in the Schedule

**Tenant's Improvements and Betterments:** (Applies only when the Insured is not the building owner) Tenant's improvements and betterments as used in this endorsement shall mean fixtures, alterations, installations or additions comprising a part of building, which are at the expense of the Insured but which are not legally subject to removal by the Insured.

In the event tenant's improvements and betterments covered hereunder are damaged or destroyed by a peril not excluded by this policy, the Insured's interest therein and the liability of the Company shall be determined as follows:

1. If repaired or replaced at the expense of the Insured within a reasonable time after such loss the actual cash value of the damaged or destroyed property;
2. If not repaired or replaced within a reasonable time after such loss that proportion of the original cost of the property which the unexpired term of the lease or rental agreement (whether written or oral, in effect as of the time of loss) bears to the period(s) from the date(s) the property was installed to the expiration date of such lease or rental agreement;
3. If repaired or replaced at the expense of others for the use of the Insured, there shall be no liability hereunder.

**PROPERTY EXCLUDED**

This insurance does not apply to street clocks, other clocks, electrical or mechanical signs, not located within the building, exterior glass and any lettering or ornamentation thereon including glass of outside showcases, architect fees, cost of excavations, underground flues, pipes, wiring, drains, brick, stone or concrete foundations, piers or other supports below the undersurface of the lowest basement floor or where there is no basement which are below the surface of the ground, land values.

#### **PERILS EXCLUDED**

As to property covered by this endorsement, this policy does not insure against: 1) breakage of interior glass unless caused by fire, lightning (provided such perils are covered by this policy), burglary, theft, windstorm, hail, not riot attending a civil commotion, explosion, smoke, aircraft, land vehicles, vandalism, malicious mischief or sprinkler leakage; 2) loss or damage caused by water, theft, mechanical breakdown or latent defect, or short circuit, blowout, or other electrical disturbance within any single insured hereunder, unless fire or explosion ensues, and then only for direct loss or damage caused by such ensuing fire, (provided such perils are covered by this policy) or explosion.

(Continued on Reverse Side)

POLICY NUMBER	INSURED	EFFECTIVE
JB 100 57 92	T/A JEWELRY BY GLADSTONE	5-7-71
FIREMAN'S FUND INSURANCE COMPANY THE AMERICAN INSURANCE COMPANY NATIONAL SURETY CORPORATION ASSOCIATED INDEMNITY CORPORATION AMERICAN AUTOMOBILE INSURANCE COMPANY	PRODUCER  W.M. ROSS & CO. COUNTERSIGNATURE OF AUTHORIZED AGENT	
<i>L. D. Lissauer</i>	SIDENT 70 X	<i>W. M. Ross</i>

**JEWELERS' BLOCK POLICY  
COMBINATION ENDORSEMENT A**

The policy to which this endorsement is attached is hereby amended by the items marked by .

**SHOW WINDOW DISPLAY ENDORSEMENT (JB 1242)**

In consideration of an additional premium of \$ \_\_\_\_\_, this insurance is extended to cover loss of or damage to property contained in the show windows at the Insured's premises by theft or attempted theft accomplished by or resulting from the smashing or cutting of such windows, subject to the following limitations and stipulations:

A. The maximum liability of the Company shall be:

	1. WHEN THE PREMISES ARE OPEN TO BUSINESS		2. WHEN THE PREMISES ARE CLOSED TO BUSINESS	
	PROTECTED	UNPROTECTED	PROTECTED	UNPROTECTED
(a) IN ALL WINDOWS	\$	\$	\$	\$
(b) IN ANY ONE WINDOW	\$	\$	\$	\$

B. It is a condition of this insurance precedent to any recovery hereunder that the values of property displayed will not exceed the amounts represented in answer to Question 14-B of the Proposal form attached to this policy.

**PROPERTY IN CUSTODY OF PERSONNEL AWAY FROM PREMISES  
(APPLICABLE WHEN POLICY LIMIT 2(E) EXCEEDS \$5,000) (JB 1080)**

It is understood and agreed that the liability of the Company for property in the custody of the Insured, any employee member of the firm, or officer of the corporation outside the premises of the Insured (as referred to in this policy) is limited to \$5,000, unless the name of such individual is listed hereunder:

**JEWELERS' SECURITY ALLIANCE (JB 1081)**

In consideration of the premium at which this policy is issued, it is understood and agreed that the Insured shall at all times maintain membership in the Jewelers' Security Alliance during the life of this policy.

**MONEY (JB 1439)**

In consideration of an additional premium of \$ **INCL.**, and subject otherwise to all of its terms, conditions and exclusions this policy is extended to cover for an amount not exceeding \$ 1,000 on money in locked safe(s) or vault(s) within that part of the building premises occupied by the Insured situated

**2ND. FLOOR OF 263 CENTER AVE. WESTWOOD, N.J.**

against the risk of theft by such safe(s) or vault(s) being broken open. Thus making the total amount insured \$ 41,000 subject to each limit of liability set forth in this policy.

**UNEARNED PREMIUM (JB 1084)**

In consideration of an additional premium of \$ \_\_\_\_\_, it is hereby provided that in the event the amount of insurance under this policy shall be reduced by loss payment, the Company shall pay to the Insured the pro rata portion of the premium unearned at the date of the loss on the amount of each loss payment.

**PREMISES FIRE EXCLUSION (JB 1082)**

In consideration of the reduced premium charged, this policy excludes loss or damage to property at the premises of the Insured as referred to in this policy directly or indirectly caused by, or resulting from, fire or lightning.

POLICY NUMBER	INSURED	EFFECTIVE
JB 100 57 92	T/A JEWELRY BY GLADSTONE	5-7-71
FIREMAN'S FUND INSURANCE COMPANY THE AMERICAN INSURANCE COMPANY NATIONAL SURETY CORPORATION ASSOCIATED INDEMNITY CORPORATION AMERICAN AUTOMOBILE INSURANCE COMPANY	PRODUCER  W.M. ROSS & CO. COUNTERSIGNATURE OF AUTHORIZED AGENT	
<i>L. D. Dugan</i> PRESIDENT	70-X	<i>W. Brinkley</i>

31-545-181

## EXHIBIT 10 - INSURANCE DOCUMENTS.

650 NASSAU ST., NEW YORK, N.Y.

81a

COVERAGE IS PROVIDED BY THE COMPANY DESCRIBED IN FORM  
A STOCK INSURANCE COMPANY (HEREIN CALLED THIS COMPANY).

No. F-501 14.96

IN INSUREE'S NAME AND ADDRESS: (NO. STREET, TOWN, COUNTY, STATE, ZIP)

MURRAY GLADSTONE D/B/A  
JEWELRY BY GLADSTONE'SPART I THIS DECLARATIONS PAGE, WITH POLICY PROVISIONS, PART II AND  
ENDORSEMENTS IF ANY, MAKE UP FORM A FIRE INSURE DOCUMENTS. THE BELOW  
CONTAINS INSURANCE POLICY INFORMATION.

01 FIREMAN'S FUND INSURANCE COMPANY  
 18 THE AMERICAN INSURANCE COMPANY  
 07 NATIONAL SURETY CORPORATION  
 13 ASSOCIATED INDEMNITY CORPORATION  
 15 AMERICAN AUTOMOBILE INSURANCE COMPANY

Policy Term: 10/30/70 - 10/30/71  
Inception (Mo., Day, Yr.)      Expiration (Mo., Day, Yr.)

It is important that the written portions of all policies covering the same property read exactly alike. If they do not they should be made uniform at once.

INSURANCE IS PROVIDED AGAINST ONLY THE PERILS AND FOR ONLY THOSE COVERAGES INDICATED BELOW BY A PREMIUM FOR THE PERILS AND FOR OTHER COVERAGES ONLY WHEN ENDORSED HEREON OR ADDED HERETO.

## DESCRIPTION AND LOCATION OF PROPERTY COVERED

Show address (No., Street, City, County, State, Zip Code), construction, type of roof and occupancy of building(s) covered or containing property covered. If occupied as a dwelling state if building is a seasonal or farm dwelling and if siding is aluminum or plastic. If commercial state exact nature of product (and whether manufacturer, wholesaler or retailer) or the service or utility involved.

ON CONTENTS USUAL TO A JEWELRY FINISHER WHILE  
CONTAINED IN A BRICK BUILDINGSITUATE: 26 WEST 47TH STREET,  
NEW YORK, N.Y.

AGENT  
RECEIVED  
DATE  
CITY  
STATE  
130

Dwelling Business Only					
Item No.	Pro-tection Class	No. of Families	Feet From Hydrant	Miles From Fire Dept.	Zone

C-37842

Item No.	PERIL(S) INSURED AGAINST (INSERT NAME OF EACH)	Per Cent of Co-Insurance Applicable	Deductible Amount	Amount of Insurance	Rate	Prepaid or Installment Premium Due At Inception	Installment Premium Due At Each Anniversary
1.	FIRE AND LIGHTNING EXTENDED COVERAGE	80%	50.	\$20,000. XXXX	.036 .074	\$ 207. 15.	\$
	FIRE AND LIGHTNING EXTENDED COVERAGE			XXXX			
						TOTALS \$ 222.	\$

TOTAL PREMIUM FOR POLICY TERM PAID IN INSTALMENTS

\$

\$

\$

attached hereto.

Subject to Form Nos.

GR80(1-69)

Mortgage Clause: Subject to the provisions of the mortgage clause attached hereto, less, if any, on building items, shall be payable for:  
INTEREST RATE: 10% ANNUAL AND MAILED ALONG WITH THIS POLICY.

DATE OF COUNTERSIGNATURE



DAVID HOROWITZ, INC.  
33-545 181-150 NASSAU ST., NEW YORK, N.Y.

NEW

BRS-112 74 19 83a

ITEM	DESCRIPTION INSURE AND DATE	POLICY NUMBER	INSURANCE CO. & STATE	ISSUED	TYPE DATE	STATE	TERM	POL. FORM	CLASS	PREMIUM
CO					63 90				42	
01	COVERAGE PROVIDED BY FIREMAN'S FUND IN COMPANY DESIGNATED AS THE AMERICAN NATIONAL BY NUMBER 07 NATIONAL SURETY		13 ASSOCIATED INDEMNITY 15 AMERICAN AUTOMOBILE						40	
									30	

ITEM 1. INSURED'S NAME AND ADDRESS: CITY, STREET, TOWN, COUNTY, STATE

MURRAY GLADSTONE D/B/A  
JEWELRY BY GLADSTONE'S  
26 WEST 47 ST.  
NEW YORK, N.Y.

ITEM 2

3/10/72

1/20/72

INCEPTION TWO DAY YR.

EXPIRATION TWO DAY YR.

12 NOON STANDARD TIME AT THE ADDRESS

AS STATED HEREIN

PRODUCER  
PLEASE SHOW  
NAME &  
DATE OF  
COMMENCEMENT

150

LOCATION OF PREMISES -  
ENTER NAME OR NAME FOR ADDRESS IN ABOVE ADDRESS

SAHE

BUSINESS OR USE INSURED  
CONDUCTED IN THE PREMISES

JEWELRY FINISHER

NO OTHER BUSINESS IS CONDUCTED IN THE  
PREMISES OF MODERN JEWELRY  
CASTING CO., INC.

ITEM 3. THE INSURANCE AFFORDED IS ONLY WITH RESPECT TO SUCH OF THE FOLLOWING COVERAGES AS ARE INDICATED BY A CHECK. LIMIT OF INSURANCE  
APPLICABLE THERETO SUBJECT TO ALL THE TERMS OF THIS POLICY HAVING REFERENCE THERETO.

- A. ROBBERY INSIDE THE PREMISES
- B. ROBBERY OUTSIDE THE PREMISES
- C. SALE BURGLARY

COVERAGE

Held up

LIMITS OF INSURANCE

\$5,000

CODE

222.

\$

\$

\$

FORM NUMBER OF ENDORSEMENTS ATTACHED TO POLICY AT ISSUE

140243

AT INCEPTION

1ST ANNIVERSARY

2ND ANNIVERSARY

D. RATE OF ANNUAL  
INSTALLMENT PREMIUM DUE

\$

\$

\$

TOTAL PREMIUM \$ 222.

ITEM 4. CUSTODIAN AND

OTHER PERSON(S) SHALL BE ON DUTY AT ALL TIMES WHILE THE PREMISES ARE OPEN FOR BUSINESS.

ITEM 5. NO MORE THAN ONE MESSENGER SHALL HAVE CUSTODY OF THE INSURED PROPERTY OUTSIDE THE PREMISES AT ANY ONE TIME, UNLESS OTHERWISE  
STATED HEREIN.

ITEM 6. EACH MESSENGER WHILE OUTSIDE THE PREMISES SHALL BE ACCOMPANIED AT LEAST ONE GUARDIAN.

GUARDIAN

ITEM 7. THE INSURED PROPERTY WHILE OUTSIDE THE PREMISES IN THE CARE OF THE MESSENGER SHALL BE CONVEYED IN

EMPLOYED FOR THE EXCLUSIVE USE OF THE MESSENGER AND HIS GUARDIAN, ANY, THROUGHOUT THE ENTIRE TRIP.

ITEM 8. DESCRIPTION OF VAULT

10' X 10' X 8' HIGH

10' DEPTH  
6' WIDTH  
4' HEIGHT

DESCRIPTION OF VAULT

ITEM 9. DATE OF PURCHASE OR CONSTRUCTION

10/1968

10' DEPTH  
6' WIDTH  
4' HEIGHT

ITEM 10. DURING THE LAST FIVE YEARS THE INSURED HAS NOT PURCHASED OR RECEIVED FROM ANYONE ELSE ANY VAULT OF THE KIND PROVIDED HEREBY, UNLESS OTHERWISE  
STATED HEREIN.

ITEM 11. DURING THE LAST FIVE YEARS NO INSURED HAS PURCHASED INSURANCE ISSUED BY THE INSURED AGAINST LOSS COVERED HEREBY, UNLESS OTHERWISE  
STATED HEREIN.

ITEM 12. NO OTHER INSURANCE ISSUED BY THE INSURED IS IN FORCE WHICH COVERS LOSS COVERED HEREBY, UNLESS OTHERWISE STATED HEREIN.

OTHER INSURANCE PERMITTED

ITEM 13. IN ACCEPTANCE OF THIS POLICY THE INSURED AGREES THAT ANY PRIOR POLICY HEREIN DESIGNATED IS CANCELLED AS OF THE TIME THIS POLICY  
BECOMES EFFECTIVE.

DATE OF ISSUE

3/12/72 PA

SUCCESIVE POLICY NO.

EXHIBIT 11 - LETTER DATED MARCH 18, 1975 FROM W.M. ROSS AND  
COMPANY TO LEO LAURANCE, ESQ.

Commercial

84a

Personal

Life

*W. M. Ross & Company, Inc.*

*Insurance Specialists*

*Upper Montclair Plaza, Upper Montclair, N.J. 07043 (201) 782-4800  
(212) 283-9788*

March 18, 1975

Leo Laurance, Esq.  
299 Broadway, Room 1510  
New York, New York 10007

Re: Murray Gladstone T/A Jewelry by Gladstone  
Loss: 5/21/71

Dear Mr. Laurence:

This is in response to your letter of March 7, 1975. Based on instructions from Mr. James Hughes, attorney for Firemans Fund, I enclose copy of original Loss Report which confirmed our telephone report of the loss. Also enclosed is a copy of the binder sent to Firemans Fund Insurance Company and Mr. Gladstone when the coverage was originally effected.

Very truly yours,

*W. Bohde*

William H. Bohde  
Vice President

WHB:ccb

CC: James Hughes, Esq., Bigham, Englar, Jones & Houston ✓  
Mr. W. Schenck, Claim Department, Firemans Fund ✓

EXHIBIT 12 - ADVICE OF INSURANCE  
ADVICE OF INSURANCE

85a

W. M. ROSS & COMPANY, INC.  
*Insurance Specialists*

To: Mr. Murray Gladstone  
263 Center Street  
Westwood, New Jersey

UPPER MONTCLAIR PLAZA  
UPPER MONTCLAIR, N. J. 07043  
Tel. 783-4800 - Area Code 201

Dear Sir:

In accordance with your instructions, coverage has been bound and ordered for the policies listed herein, effective: May 7, 1971

1. JEWELLERS BLOCK: in accordance with application on file with company
2. WORKMEN'S COMPENSATION: statutory
3. STOREKEEPERS LIABILITY: \$100,000. limit
4. ROBBERY & HOLDUP: \$2,000. limit - Inside & Outside

Name of Insured: Murray Gladstone c/b/a Jewelry by Gladstone

Policy Numbers: to be assigned - Firemans Fund Insurance Company

The policy(s) are now being prepared by the Underwriters and will be sent to you in the near future.

**IMPORTANT NOTICE**

If there is any inaccuracy in the coverage requested as described above, please advise immediately.

5/7/71

Yours very truly,  
W. M. ROSS & COMPANY, INC.

Per:

*William H. Bohde Jr.*  
William H. Bohde

MEMBER:  
 AMERICAN INSTITUTE  
 OF CERTIFIED PUBLIC ACCOUNTANTS  
 —  
 NEW YORK STATE SOCIETY  
 OF CERTIFIED PUBLIC ACCOUNTANTS

## EXHIBIT 13 - REPORT OF THEODORE M. RUZOW

NEW JERSEY  
 623-9036

## THEODORE M. RUZOW

CERTIFIED PUBLIC ACCOUNTANT

500 FIFTH AVENUE  
NEW YORK, N. Y. 10036

947-8011

February 7th, 1972

Joseph Connors, Esq.  
 Bigham, Englar, Jones & Houston, Esqs.  
 99 John Street  
 New York, New York 10038

Re: Jewelry By Gladstone  
 263 Center Avenue  
 Westwood, New Jersey  
 D/1 May 21, 1971  
 Insuror: Firemen's Fund American Companies  
 15 Washington Street  
 Newark, New Jersey  
 Policy # JB 1005792

F I N A L R E P O R T

Dear Mr. Connors:

You have advised us that the insured has commenced suit and at a meeting with Mr. William Schenck we were requested to submit a report of our findings.

The Proposal for the Jewelers' Block Policy was dated April 27th, 1971 and in replying to several questions the then applicant describes the enterprise as a "new business".

In the answers given to question six (6) the applicant states that he keeps a detailed stock record and says that he takes a physical stock inventory annually.

The remaining questions posed by the Proposal are answered in such a manner as to make them of no use in our inquiry.

Our investigation reveals that Murray Gladstone was the sole stockholder and operating officer of Modern Jewelry Casting Co., Inc. located at 26 West 47th Street New York City up to October 2nd, 1970. This business performed essentially a labor operation only, upon other peoples property.

## Exhibit 13 - Report of Thodore M. Ruzow

Joseph Connors, Esq.

February 7th, 1972  
Page 2

On October 2nd, 1970, Gladstone sold his entire interest in the business to Morris Pearl. Morris Pearl was and presently is the accountant for Murray Gladstone. The attorney who prepared the agreements was Leo M. Laurance and he was named the escrow agent in the agreement. Mr. Laurance is also the attorney for Mr. Gladstone in his suit against your company and we have been informed that Mr. Laurance represented Mr. Gladstone in a matrimonial matter in the fall of 1970 which culminated in Mrs. Gladstone obtaining a divorce from her husband. Mr. Laurance is reported to be the owner and landlord of the location 263 Center Avenue, Westwood, New Jersey, which was occupied by Mr. Gladstone as a retail location and where the hold-up is reported to have taken place.

The record is not clear as to whether Gladstone operated only Modern Casting for some period of time prior to October 2nd, 1970 or whether he was involved in other enterprises as well.

The sale of Gladstone's interest in Modern Casting was made in exchange for a series of promissory notes aggregating \$6,100, together with the buyer assuming an obligation to pay two outstanding loans i.e. one with the Bank of Commerce (apparently Gladstone was sole obligor) and one with the Franklin National Bank (Gladstone and Pearl were co-obligors). The amounts of these loans is not known.

Since the hold-up of May 21, 1971, Gladstone has alleged that he received at the time he sold his interest in Modern Casting, finished jewelry consisting of rings mounted with precious and semi-precious stones and other jewelry with a value of \$8,910. The contention of Gladstone is not supported by any record submitted to us. We have visited Modern Casting offices and talked to Morris Pearl and he has not been able to produce any records which support this statement by Gladstone. Your attention is directed to the fact that Modern Casting was not in the business of making or selling finished jewelry. Furthermore Modern Casting was reported to be heavily in debt and operating at an unsatisfactory profit rate.

Mr. Gladstone has stated to us that after he left Modern Casting he began to peddle jewelry door to door. He conveyed the impression that he was selling at retail. At various times he indicated that he was acquiring jewelry by purchase and on consignment. He has said that some of his sales were at wholesale. The latter statement was made to try and explain his failure to file either New Jersey or New York State Sales Tax Returns. Such returns are required to be filed even if all sales are at wholesale and are non-taxable (see copies of New Jersey Sales Return filed and instructions). You will note that the return for the period 11/1/70 to 3/31/71 indicates that all sales were at wholesale although he has stated

## Exhibit 13 - Report of Theodore M. Ruzow

Joseph Connors, Esq.

February 7th, 1972  
Page 3

to u that he made a considerable amount of sales at retail. Both the enclosed sales tax returns were filed late on August 4th, 1971 which was after date of loss (May 21, 1971). Finally he opened the retail store in Westwood and he intended to use a salesman to continue to peddle door to door.

We have examined and obtained a copy of Gladstones U. S. Individual Income Tax Return for 1970. If Mr. Gladstone had conducted a business from October 2 to December 31st, 1970 (as he now conceded in his statements, books, and sales tax returns) he would be obliged to report these transactions in his 1970 tax return and specifically on a Schedule "C" form attached to his return. This form is in the nature of a Profit and Loss Statement and requires the taxpayer to list his opening and closing inventory of stock in trade as well as sales made and expenses paid. Mr. Gladstone did not file any reports of these activities with the Internal Revenue Service as the enclosed copy will reveal. If Schedule "C" was submitted it would have revealed his stock inventory value at December 31st, 1970, and made possible determination of his inventory values at risk on May 21st, 1971.

A conclusion which may fairly be drawn from the absence of reporting any transaction by Gladstone individually in 1970, would be that no such transactions took place and this would include the alleged acquisition of finished jewelry from Modern Casting. It is to be noted that Gladstone did not report the transaction represented by the sale of his stock in Modern Casting as he was required to report. This return was prepared by the other party to the sale i.e. his accountant, Morris Pearl.

Gladstone presented a claim on a sheet of journal paper which purported to reveal his gross purchases, sales, returns, remaining stock after the hold-up and the amount of his loss. The loss amount is stated at \$41,126.30. The remaining stock is listed at \$6,086.51.

When this matter was assigned to us for audit, we began our examination by taking an inventory of the jewelry remaining at the store on June 1, 1971. The amounts of that inventory was \$6,907.77. Gladstone stated that no transaction had occurred between the date of loss and June 1, 1971.

At our first meeting with Gladstone we were informed that he had no records of his business which had been compiled from the period from October 2, 1970, to the date of the loss. He placed the blame for this omission upon his accountant. He agreed to have his accountant write up his

## Exhibit 13 - Report of Theodore M. Ruzow

Joseph Connors, Esq.

February 7th, 1972  
Page 4

books. He admitted that no sales tax returns or income tax returns had been filed, although he admitted that such returns were overdue. He blamed this situation upon his marital difficulties.

Gladstone admitted that he did not maintain a detailed record of stock and value (see Proposal #6). He produced a Rolodex file which contained cards for finished jewelry which totaled \$13,395.00, but this file only listed items acquired and did not record items sold. Gladstone has not placed much importance upon this record.

We have tried to develop from the following available sources an approximation of the value of jewelry on hand on May 21st, 1971 before the alleged hold-up:

1. U. S. Individual Insurance Tax Return
2. New Jersey Sales Tax Return (filed after May 21st, 1971)
3. sales slips
4. purchase invoices
5. contract of sale of Modern Casting Co., Inc.
6. business and personal bank accounts of Gladstone
7. visits to suppliers to verify purchases

We conclude that the insured cannot establish the value of his stock at the loss location on May 21st, 1971. The following comments apply to the Claim as filed.

Purchases

The Claim indicates that gross purchases amounted to \$50,928.56. No purchase journal was maintained until long after the loss date and most alleged purchases were not paid by the time our audit was concluded. Therefore verification of purchases has been accomplished by resort to payments actually made by Gladstone and by visiting the business premises of vendors and examining their records to confirm sales by them to Gladstone. The jewelry industry is notorious for its poor record keeping procedures and most vendors who we visited exhibited to us inadequate proof of their sales to Gladstone. Nevertheless where ever any minuscule proof was offered we have accepted the purchase in full.

The amount of such verified purchases is \$32,175.13. The difference between the claimed and verified purchases is \$18,753.43. This difference is made up of several minor discrepancies and the following major items:

## Exhibit 13 - Report of Theodore M. Ruzow

Joseph Connors, Esq.

February 7th, 1972

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A - <u>Gold purchased</u>	\$ 3,366.00
[there is no proof offered for the acquisition of this item, Gladstone says that he owned this amount of refined gold on October 2nd, 1970]	
B - <u>Stones purchased</u>	3,800.00
[there is no proof offered for the acquisition of this item]	
C - <u>Finished Jewelry</u> (Received from Modern Casting)	8,910.00
[see comments in report]	
D - <u>Purchased from Modern Casting</u>	<u>2,450.00</u>
[records of Modern Casting do not record sales of this amount to Gladstone]	
Total <u>\$18,526.00</u>	

We confirm that after audit the insured has satisfactorily established gross purchases of \$32,175.00

Purchase Returns

We confirm that there were return purchases of \$650.00/- This amount agrees with the insured's claim.

Sales (Alternate A)

The insured's New Jersey Sales return filed after the date of loss and covering a period beginning on November 1st, 1970, rather than beginning on October 2, 1970 report your sales to the date of loss of \$6,561.00. - Almost all of these sales are reported to be at wholesale.

Gladstone exhibited to us a series of memorandum sales bills and stated that these represented "cash sales" which were not reported to the tax authorities and which were not recorded on his books. Later when he realized the significance of this concession he changed his statement and denied that they represented "cash sales". The list of these transactions are enclosed. We estimate the amount of sales in Exhibit A.

Alternate B

In our attempt to establish the true amount of sales consummated by the

## Exhibit 13 - Report of Theodore M. Ruzow

Joseph Connors, Esq.

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Page 6

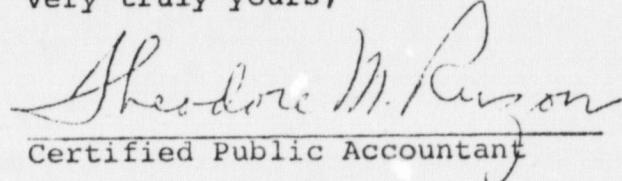
insured we have examined his various bank accounts. This effort has been directed to an analysis of his "cash flow". We have had limited cooperation from the insured and could not compel his full assistance. We have identified certain sources of cash receipts which should be ignored, such as receipts from loans obtained upon life insurance policy, (MONY) proceeds from the sale of stock, payment of notes received from Modern Casting, receipts from loan (Bank of Commerce). We then find that here are unaccounted for deposits in the business account of \$5,000.00 and in the personal checking account of \$5,011.00. To these we have added an estimate of living expenses of \$200.00 per week for 33 weeks or \$6,600.00 as a source of funds disbursed. This includes the insured's obligation to make alimony payments as well as pay legal counsel and maintain his customary standard of living. We estimate the amount of Sales in Exhibit B.

We have summarized our estimates in Exhibits A and B. We emphasize that the sales projected in each calculation are only rough guesses.

We suggest that Gladstone had only a small amount of capital when he left Modern Casting and that he would have been required to sell a substantial amount of the merchandise he purchased in order to support himself and meet his obligations during the 7 months which elapsed until he opened the retail store on May 1, 1971. Furthermore, he has stated to us that he had at, at first, intended to peddle jewelry and it was only after that proved an insufficient source of earnings for him did he change his plans and consider a retail store operation. Therefore, until he changed his plans he must have sold a considerable amount of the merchandise purchased. We believe that the sales estimated under either alternate A or B are the minimum amount of sales made by the insured for that period of time and the actual sales consummated may have been for a much larger amount.

We regret that the records and oral statements of the insured do not permit us to provide you with precise conclusions.

Very truly yours,



Theodore M. Ruzow  
Certified Public Accountant

TMR/mb

Encls.: Copy of Agreement  
 Claim  
 Tax Return 1970  
 2 New Jersey Sales Tax Returns  
 Physical Inventory 6/1/71  
 List of stock from Rolodex  
 Copies of bank statement  
 Exhibits A and B, etc.

CC/ William Schenk  
 Fireman's Fund American  
 Insurance Co.

## Exhibit 13 - Report of Theodore M. Ruzow

*Jewelry Tax Blanks* ~~Exhibit A~~  
*Estimated Calculations* *D/L 5-21-71*

Gross Purchases Verified		3217513	
Less Return Net Purchases		600-	
			3152513 ✓
Date - 10/1/70 - 1/2/71:-			
Sales from Sales Tax Return "10/1/70 - 1/2/71" (656079)			
Less Cash Sales		159.2-	
Cost of Sales - 60% Estimated		24415879	13361-
Inventory of Jewelry Loan Estimated Jewelry Loss			1815413 690.8-
Estimated Loss			1125613
Original After Loss			

## Exhibit 13 - Report of Theodore M. Ruzow

January by 122 feet  
J. Allard's Calculations

EXH 13 17 "B"

Gross Receipts Verified	321713
Return	65802
Net Receipts	315213
Period - 11/70 - 7/1/71:	
Sales from Sales Tax return 11/70-7/1/71 (1)	265607
Cash receipts 10/1/70 - 7/1/71	76845.4
Customer's Account of Sales	238457
Unaccounted for Major	500000
Reprints in Personal Checks	
Account Discrepancy	(521108)
Bank Expenses - 33 weeks @ \$200. - Est.	2648 -
② Cash of Sales - 60% - Estimated	2317187
12903 -	
Overstating of Sales Loss	1762213
Understating after loss	6708 -
Estimated Loss	1071413
③ Total After Loss	

REPLY AFFIDAVIT OF JAMES M. HUGHES (Filed August 12, 1975)  
UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

86a

MURRAY GLADSTONE,

Plaintiff, : REPLY AFFIDAVIT

-against- : Civil Action No.  
FIREMAN'S FUND INSURANCE COMPANY, : 72 Civ. 794  
Defendant. : (H.F.W.)

STATE OF NEW YORK }  
COUNTY OF NEW YORK } SS:-

JAMES M. HUGHES, being duly sworn, deposes and  
says:

1. That I have read the answering affidavits in opposition to the defendant's motion for summary judgment, and I submit this affidavit in reply thereto.
2. An analysis of plaintiff's position as reflected in the answering affidavits immediately discloses the fundamental weakness and unsoundness of that position. In his long rambling affidavit replete with argumentation, conclusions and sly innuendoes regarding the integrity of defendant's representative Robert J. Forrester, the plaintiff-assured makes the startling pronouncement that he "never saw the application" before signing the same but relied solely on the answers inserted in the ~~said~~ application (Proposal) by Mr. Forrester. This is a subtle attempt on the part of the plaintiff to avoid the binding effect of his answers to the clear and unambiguous language set forth in the series of simple questions in the Proposal and, if possible, to create a triable issue with respect to the

breach of warranty defense based upon Questions 2 and 11(a)(b)(c) of the Proposal. As pointed out in defendant's Memorandum of Law (Point IV), the contention that one has not read the application for insurance before signing the same and is therefore not bound by the answers therein is unavailing to an assured since he is conclusively presumed to have read the application and is bound by the answers contained therein, even though such answers are innocently or mistakenly made and despite the fact that they are inserted in the application by a third party.

3. This Court will note that plaintiff is careful not to dispute the fact that he supplied to Mr. Forrester the answer to Question 2 to the effect that the nature of his business based on sales was 10% wholesale and 90% retail. However, plaintiff attempts to get around the damaging effect of this admittedly untruthful answer to Question 2 by stating that he was not apprised by Mr. Forrester of the fact that Question 2 related solely to the 12-month period immediately preceding the date of the Proposal and not to the 12-month period after the commencement of the new business, notwithstanding the fact that a simple reading of the Proposal would have disclosed differently. Nowhere in Question 2 are the words "new business" used in either propounding or answering the question, despite the fact that plaintiff attempts to read such words into each question and answer in the Proposal. On the contrary, the wording of Question 2, including the clause printed just above Question 2, reading, "The answers to questions 2, 11a, 11c, 11d, 17c and 17d must be based on the 12 months period immediately preceding the date of this proposal," is clear and unambiguous on its face and readily understandable.

without explanation. It requires no extrinsic oral evidence to explain its meaning. Upon a trial of this action, it is respectfully submitted, the Court herein could not legally permit the introduction of parol evidence to vary or contradict the plain and unequivocal language of the Proposal itself which by its precise terms is made part and parcel of the insurance contract. Needless to say, the intention of the parties to the insurance contract was to place themselves beyond the uncertainties of oral testimony. The plaintiff, in effect, is endeavoring to write a new contract of insurance as supposed by him -- wholly different from that upon which the premium was based and the risk evaluated. Neither plaintiff nor his attorney contends, much less proves, any fraud on the part of Mr. Forrester which induced the plaintiff to sign the Proposal upon the basis of the answers as written down by Mr. Forrester. As stated by Mr. Justice Asch of the New York Supreme Court in his decision interpreting a New Jersey contract of insurance based on the New Jersey law (page 37 of defendant's Memorandum), it would be introducing into the law a dangerous doctrine to hold that a contracting party who, through no deceit or overbearing inducement of the other party, fails to read the contract and then is permitted to establish and enforce the contract supposed by him. The fact that plaintiff allegedly did not "see" the application or read it has no relevant bearing on this motion whatever since he is conclusively presumed to have read the entire Proposal, including both the questions and the answers therein and to be bound by such answers, albeit innocently or mistakenly made.

4. In his affidavit, the plaintiff appears to place considerable emphasis upon the words "new business"

appearing next to the word "none" in answer to Questions 11 and 17 and, in connection therewith, refers to plaintiff's Exhibit "7" which shows the date 5-1-71 in answer to Question 17(a). Plaintiff thereupon gratuitously concludes that in inserting the date 5-1-71, it was the intention of both the plaintiff and the defendant to answer the questions in the Proposal only in relation to the new business that was to be started sometime in May 1971. This Court will note that in defendant's own copy of the signed Proposal (Exhibit "A" annexed to the moving papers), the date 5-1-71 does not appear at all in the answer to Question 17(a). The Court will further note that in Mr. Forrester's sworn affidavit, he states (p. 2): "The written figure 5-1-71 in question 17(a) is not in my handwriting." This is also the sworn testimony of Mr. Forrester given upon examination before trial conducted by plaintiff's attorney. This raises the serious question as to whether plaintiff himself inserted the date 5-1-71 in his copy of the signed Proposal at some unknown later date since, significantly enough, the copy of the Proposal retained by plaintiff, a photostatic copy of which is annexed to his complaint in the action herein as an exhibit, also bears the date 5-1-71 in answer to Question 17(a). It is rather obvious, therefore, that no such conclusion as claimed by plaintiff can be drawn from the insertion of the date 5-1-71 in answer to Question 17(a) since such date does not appear in Exhibit "A" annexed to the moving papers. In any event, the motion herein does not involve Question 17(a) but is directed solely to Questions 2 and 11(a)(b) and (c) on the breach of warranty defenses.

5. Plaintiff in his affidavit also erroneously states and concludes: "There was never any question raised

in answering the questions in this proposal relating to old business" (page 4 of Gladstone affidavit). A plain reading of the Proposal clearly demonstrates that several of the questions in the Proposal in addition to Questions 2, 11 and 17 necessarily related to prior (old) business activity, extending in one instance as far back as five years, to wit, Question 4, wherein inquiry is made as to plaintiff's prior losses for the preceding five (5) years. Question 5 deals with prior cancellations, if any, of insurance issued to plaintiff by other insurance companies. Plaintiff's statements and conclusions on this point are, it is respectfully submitted, somewhat suspect since a plain reading of the questions in the ~~Proposal~~ establish that answers were required covering the period prior to the signing of the Proposal as well as the period subsequent to the signing of the Proposal. However, the ~~Proposal~~ clearly and concisely states that Questions 2, 11(a), 11(c), 11(d), 17(c) and 17(d) must be based on the 12-month period immediately preceding the date of the ~~Proposal~~.

6. What has been said heretofore with respect to the answers given by plaintiff to Question 2 of the ~~Proposal~~ applies with equal force and effect to the answers given by plaintiff to Question 11(a)(c)(d) of the ~~Proposal~~. Here again the question itself is headed up as follows:

"Property outside of our premises as set forth in question 1c during the last 12 months."

Assuming, without admitting, that plaintiff had any alleged oral conversation with Mr. Forrester relating in any way to plaintiff's business activities for the 12-month period prior to the signing of the ~~Proposal~~, such oral conversations, if any, are bound up in and became part of the written ~~Proposal~~ as ultimately signed by the proposer. If this were

not the rule, any assured could orally change any written answer in the Proposal warranted to be true by the simple expedient of claiming that it was not his intention at the time to give such an answer because he misapprehended the question or because he furnished a different answer to the Company representative propounding the question than was written down in the Proposal.

7. In his affidavit, plaintiff also strives mightily to create an ambiguity in the language used in the Proposal, particularly with respect to Question 2 and the instructions preceding Question 2. While it is true that plaintiff was commencing a so-called new business from a store, the plaintiff does not deny that he was engaged in the business of purchasing and selling jewelry from other than a store front for a considerable period of time prior to the date of the signing of the Proposal herein. This is not a situation where plaintiff had never been engaged in the jewelry business prior to the date of the signing of the Proposal, in which event it could reasonably be argued that Questions 2 and 11 could only apply to the new business about to be set up at the Westwood, New Jersey address. The "ambiguity" theory does not aid plaintiff either with respect to plaintiff's answer given to Question 11 for the very same reason. Question 11 was designed to obtain an answer from the prospective assured as to the location of any jewelry merchandise in his custody or control for the 12-month period prior to the opening of the new store at the Westwood, New Jersey address. Significantly enough, plaintiff supplied an answer to Question 11(c) to the effect that the "Estimated average daily amount of property in the custody or control of others during the last 12 months was

\$2500 - estimated - new business." This, along with the other previously mentioned factors, tends to refute plaintiff's argument that it was his intention and that of Mr. Forrester to answer the questions in the Proposal only in relation to new business. If, as plaintiff claims, he intended to operate a retail jewelry store at the Westwood, New Jersey address, the question then arises as to the underlying basis for plaintiff's answer to Question 11(c) regarding property in the custody or control of others outside the retail store itself.

Plaintiff's Breach of Condition 13  
of the Policy.

8. The defendant's position on this motion with respect to plaintiff's breach of Condition 13 of the policy is broken down into three separate categories, all of which are referred to in some detail in your deponent's main affidavit. The legal definition of "Notice of Loss" and "Proof of Loss" as set forth in 45 Corpus Juris Secundum, Section 981, is as follows:

"'Notice of loss' is the more or less formal notice given the company by insured or claimant under the policy of the occurrence of the loss insured against. 'Proofs of loss' are the more or less formal evidences given the company by insured or claimant under the policy of the occurrence of the loss, the particulars thereof, and the data necessary to enable the company to determine its liability and the amount thereof."

One of the questions before this Court on this motion is whether the plaintiff's unsworn statement of June 1, 1971 (Exhibit "C"), coupled with the plaintiff's Exhibit "6" referred to in his affidavit, constitutes the formal and adequate sworn proof of loss called for by the terms and conditions of the Block policy. If not, plaintiff cannot prevail on this motion for that sole reason alone, if none

9. From the very outset of this litigation and prior thereto, it has been defendant's position that at no time has the plaintiff furnished to the defendant Company or to its accountant the data necessary to enable the Company to determine its liability and the amount thereof. As the Court will note, the policy itself (Condition 13) specifies with particularity the data and documentation that must be furnished by a claimant in a sworn proof of loss as well as the specific time limit (60 days) within which such data and documentation must be furnished. The plaintiff's Exhibit "6" coupled with other exhibits referred to by plaintiff do not, it is submitted, comply with the provisions of Condition 13 in any fair construction of the language set forth in Condition 13.

10. The Court will further note that no date is set forth in plaintiff's affidavit as to when, if ever, plaintiff's Exhibit "6" or other exhibits were allegedly forwarded by plaintiff to defendant to supplement the signed statement of June 1, 1971, nor has plaintiff established that the date of forwarding, if any, was prior to the 60-day time limit for the filing of a sworn proof of loss under the policy. No claim is made by plaintiff that proof of loss was furnished to the defendant Company on the customary forms of proof of loss used by the Company, nor is there any evidence whatever to establish that the statement of June 1, 1971 is a sworn proof of loss as required by the policy. In addition to the foregoing, your deponent directs this Court's attention to the obvious insufficiency of the signed statement of June 1, 1971 as constituting a sworn proof of loss, even if plaintiff's Exhibit "6" is added on to supplement the statement of June 1, 1971. Nowhere in either the

statement of June 1, 1971 or plaintiff's Exhibit "6" is there any reference to the interest of others, including the interest of memorandors, in the property affected, or the cash value of each item involved and the amount of loss of or damage thereto, or the encumbrances thereon, as well as all other contracts of insurance, if any, whether valid or not, covering such property. The documentation submitted by plaintiff falls far short of the sworn proof of loss required by Condition 13 of the policy. The question relating to the sufficiency of the document or documents which plaintiff now claims constitute a sworn proof of loss in compliance with Condition 13 of the policy is one of law and not a question of fact to be decided upon a trial.

11. Another significant factor bearing on the foregoing issue is the statement contained in plaintiff's affidavit that on January 4, 1972, at a conference in the office of defendant's accountant, Theodore M. Ruzow, the latter allegedly rejected plaintiff's claim. While it is not admitted that Mr. Ruzow ever declined plaintiff's claim, since he had no authority to do so, nevertheless, it is significant to note by plaintiff's own admission that on January 4, 1972, some six (6) months after the time of plaintiff to file a sworn proof of loss had expired, the defendant Company was still endeavoring to determine if liability under the policy existed and also the extent of such liability, if any. It is quite true, as pointed out in plaintiff's affidavit, that Mr. Ruzow's report (Exh. "13") speaks for itself. It pictures in graphic detail some nine (9) months after the plaintiff's loss the total inability of the Company to ascertain the amount of plaintiff's loss from any records submitted by plaintiff.

12. The remaining two categories upon which defendant relies to support its defenses based upon the breach of the requirements set forth in Condition 13 are that plaintiff did not submit notice in writing to the Company nor furnish a complete list of the lost property stating the market value and cost of each article and the amount claimed thereon. In connection with the written notice of loss requirement, the plaintiff does not dispute the fact that he merely phoned his "broker" regarding the loss. Both the plaintiff and his attorney are apparently confused as to the true status of the "broker," W. M. Ross and Company, Inc., Upper Montclair, New Jersey, in this situation. The latter is an authorized agent of the defendant Company who countersigned the policy in suit and who was authorized to effect contracts of insurance on defendant's behalf. It is submitted that a written notice of loss by plaintiff to W. M. Ross and Company, Inc. would have complied with the requirement of the policy calling for written notice of loss by the assured to the Company. A phone notice to the Company's agent, W. M. Ross and Company, Inc., is not such compliance. Plaintiff's Exhibit "8," which the plaintiff refers to in his affidavit as the claimed written notice by him to the Company, is merely the agent's formal notification of the loss to its own principal. Totally lacking in this situation is any writing from the plaintiff himself regarding the loss to either the defendant Company or to its authorized agent, W. M. Ross and Company, Inc. Plaintiff's Exhibit "8" was supplied to plaintiff's attorney by W. M. Ross and Company, Inc. upon the written request of your deponent. It is respectfully submitted that said document does not represent a written

notice of the loss by the plaintiff-assured to the Company in compliance with Condition 13 of the policy.

13. The remaining requirement of Condition 13 of the policy calls upon the plaintiff-assured to furnish a complete list of the stolen property stating the market value and cost of each article and the amount claimed thereon. The plaintiff refers in his affidavit to a plethora of documents designated Exhibits "1" through "6" in the fond hope that the sheer size and complexity of such documents will suffice in complying with the aforementioned requirement of Condition 13. A study of such documents, including plaintiff's so-called inventory book, the plaintiff's bills of purchase and plaintiff's book of sales, etc., will show that such material is not the complete list of the stolen property, with the requisite information, as called for by Condition 13.

14. The plaintiff also has had the temerity to annex to his opposing affidavit as an exhibit (No. 13) the report of Theodore M. Ruzow, the certified public accountant whose services were retained by the defendant Company, primarily for the purpose of auditing the plaintiff's books and records to determine the amount of loss sustained by plaintiff, in which task Mr. Ruzow emerged unsuccessful for the reasons stated in Mr. Ruzow's audit report (Exh. 13). In his affidavit, plaintiff proceeds to draw several very erroneous conclusions from the material contained in Mr. Ruzow's audit report, e.g., (1) that there is no question as to verification by Mr. Ruzow of more than \$32,000 of the loss; (2) there is no question as to proof of loss being sworn to and served; and (3) there is no question as to submission of written notice of loss. A simple reading

9/a

of Mr. Ruzow's report will disclose that he could not verify any specific amount of loss as having been sustained by plaintiff. At best, Mr. Ruzow after a careful and exhaustive investigation, could not do more than merely estimate plaintiff's loss to be in the sum of \$10,714.13, and this was a guesstimate based on insufficient evidence. It was not Mr. Ruzow's duty or obligation as an accountant hired by the defendant Company to determine whether plaintiff had complied with the terms and conditions of the policy to the extent of having filed written notice of loss and a sworn proof of loss. Nowhere in Mr. Ruzow's audit report is any mention made of notice of loss or sworn proof of loss. This, it is respectfully submitted, is a legal question to be resolved by someone other than an accountant who is hired by an insurance company to determine the amount of loss sustained by an assured after a loss has occurred.

15. One final word must be said with respect to the gratuitous and wholly uncalled for remarks contained in the Memorandum of Law submitted by plaintiff's attorney (pp. 17-19) wherein said attorney accuses your deponent of citing dead law and also points an accusing finger at Mr. Justice Asch of the Supreme Court, New York County as being "quite obviously ignorant of the decision" (Cooper v. Government Employees Ins. Co., 51 N.J. 86, 237 A.2d 870 (1968)) when Judge Asch handed down his recent memorandum opinion of May 8, 1975 (Trial Term, Part II) in the case of J.A.G. Trucking v. The Continental Insurance Co., referred to on page 37 of defendant's Memorandum of Law. In lieu of submitting a supplemental memorandum of law on this motion, your deponent takes the liberty of referring to the

Cooper decision in this affidavit with this Court's permission. The Cooper case was an action on an automobile liability policy. The court reversed the Appellate Division and affirmed the trial court's finding that there was no breach of the notice of loss requirement. However, in dictum, the court indicated that it would break from the Whittle position and require prejudice to the insurer, in order to avoid the policy. As far as your deponent knows, the Supreme Court has not subsequently made this the rule in New Jersey. Further, the language in Cooper clearly indicates that it is motivated by policy considerations and properly limited to the case of automobile liability insurance. Neither the case before Mr. Justice Asch nor the case at bar involves an automobile liability policy. In any event, Cooper would appear to have no bearing on cases involving an assured's failure to file a sworn proof of loss in compliance with policy terms and conditions.

WHEREFORE, your deponent respectfully prays that defendant's motion for summary judgment be in all respects granted.

Sworn to before me this  
18th day of June, 1975

James M. Hughes  
James M. Hughes

Notary Public

## MEMORANDUM DECISION OF WERKER, D.J. (Filed July 2, 1975)

U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORKfiled  
JUL 2 1975  
S.D. OF N. Y.-----x  
MURRAY GLADSTONE,

Plaintiff,

-against-

FIREMEN'S FUND INSURANCE COMPANY,

MEMORANDUM DECISION

72 Civ. 794 (HFW)

Defendant.  
-----x

# 42722

HENRY F. WERKER, D. J.

Defendant Firemen's Fund Insurance Company has moved for summary judgment with respect to each of fourteen affirmative defenses contained in its amended answer. These affirmative defenses have been interposed to a complaint wherein plaintiff alleges that defendant has failed and refused to pay the proceeds of Jewelers Block Policy No. J. B. 1005792 issued on June 8, 1971, bound on May 7, 1971, and expiring May 7, 1972 in the amount of \$35,000. The plaintiff further alleges:

"5) while such contract or policy of insurance was in full force and effect and on or about the 21st day of May 1971, a burglary, larceny, theft or robbery was committed in the premises aforesaid \* \* \*."

The alleged loss resulting from said burglary, of insured premises located at No. 263 Center Avenue, Westwood, County of Bergen, State of New Jersey, was \$35,000.

The affirmative defenses asserted by the defendant can be divided into two categories: those asserted under the plaintiff's April 27, 1971 application for insurance, the

so-called "proposal," and those asserted under the written insurance policy which was delivered to plaintiff on June 18, 1971. The first, second, twelfth, thirteenth and fourteenth affirmative defenses rely on the policy. The third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh such defenses rely upon the proposal.

All of the defenses resting upon the proposal allege one or more misrepresentations made by the plaintiff on April 27, 1971 when a representative of defendant visited plaintiff's place of business in New Jersey. Defendant asserts that its representative read aloud to plaintiff the questions on the proposal and filled in the answers furnished by plaintiff. According to plaintiff, however, the questions were not read aloud to him and answers were simply filled in without his knowledge during his conversation with the insurance representative. Some of those "answers" now appear to be false. For example, the questionnaire or proposal clearly states:

"The answers to questions 2, 11a, 11c  
11d, 17c and 17d must be based on the 12  
months preceding the date of this proposal."

Plaintiff, in answer to defendant's Interrogatory 30 states that his business based on sales for the 12 month period prior to signing the proposal was all wholesale. Yet in answer to question 2 of the proposal there is a notation:

2. Nature of our business based on sales:  
Manufacturing   % Whole sale 10%  
Retail 90% Pawnbroking   .

Similarly the answers to questions 11 and 17 read as follows:

" 11. Property outside of our Premises as  
set forth in question 1c during the last 12 months.

(a) \* \* \*

- (1) None New Business
- (2) None New Business

(c) The estimated average daily amount of property in the custody of others except as provided in answer to questions 11a, 11b, 11d, and 16b during the last 12 months \$2500 estimated new business."

"17  
(a) The last merchandise inventory was taken on (give date) 5/1/71 and was exactly \$35,000 approx."

There is no issue that the plaintiff signed the proposal, nor is there a question that for the 12 months prior to signing plaintiff was in the jewelry business, that some portion of his inventory was not in his possession and that the plaintiff had not taken an inventory on May 1, 1971.

The policy provisions relied upon by defendant provide that the insured will give immediate, written notice of loss to the company and that a sworn, written proof of loss including certain specified information will be filed with the defendant within sixty days of the loss. The court has concluded that neither proper written notice of loss, nor proper written proof of loss was given. Although plaintiff did not receive his copy of the policy until June 18, 1971, he had sufficient time after the delivery of the policy to submit a properly sworn proof of loss. He did not. The proof of loss plaintiff claims to have given is a statement taken by Carl B. Grimm, one of the claims representatives of defendant, on June 1, 1971. That statement, however, does not comply with all the requirements of the policy, i.e.:

- (1) it is not a sworn statement;
- (2) it does not state the interest of insured and all others in the property affected;
- (3) the cash value of each item lost is not stated;
- (4) the amount of loss or damage thereto is not stated;
- (5) encumbrances thereon are not mentioned; and
- (6) the market value and cost of each article and the amount claimed thereon is not listed.

Paragraph 7 of the policy reads in part as follows:

"... No agreement, condition or declaration of this policy shall be waived or changed, nor shall notice to, or knowledge possessed by an agent or any other person be held to effect a waiver or change in any part of this policy unless endorsed hereon." No waivers with respect to the items considered are endorsed on the policy.

Paragraph 8A of the policy provides that it is a condition of insurance that the insured maintain a detailed and itemized inventory of his property, separately listing all travelers stocks so that any loss incurred can be accurately evaluated.

Condition 21 of the policy provides that the entire policy is void "if whether before or after a loss, the insured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto."

In a federal diversity case the district court must

apply the substantive law of the state in which it sits, including the forum state's choice of law provisions. Klaxon v. Stentor, 313 U.S. 487 (1941). In this case the New York courts would undoubtedly apply the substantive contractual law of New Jersey, the plaintiff's domicile, the place of contract negotiation and issuance, the location of the insured premises, and the place of loss. Auten v. Auten, 308 N.Y. 155 (1954).<sup>1</sup> Under the applicable New Jersey law plaintiff is bound by the answers in the proposal to which he admittedly signed his name, even though honestly but mistakenly made. See Parker Precision Products Co. v. Metropolitan Life Ins. Co., 407 F.2d 1070 (3d Cir. 1969), and cases cited therein at 1073.

The representations contained in the proposal were directly related to the premium rate on which the policy was issued,<sup>2</sup> and to the risks assumed thereon by the insurance company. Furthermore those representations were expressly made part of the policy by reference and as such constitute warranties made by plaintiff to the insurer. Procacci v. United States Fire Ins. Co., 118 N.J.L. 423, 193A 180, 182 (1937). As noted above several of these warranties were undeniably false, and as such they void the policy of insurance. Brynilson v. Ambassador Ins. Co., 113 N.J. Super 514, 274 A.2d 327 (1971). Guarraia v. Metropolitan Life Ins. Co., 90 N.J.L. 682, 101A. 298 (1917). Cf. M. Chalom & Son, Inc. v. St. Paul Fire and Marine Ins. Co., 285 2d 909 (2d Cir. 1961); Wilberg Jewelry Corp. v. Palatine Ins. Co., Ltd., 205 F. Supp. 696 (S.D.N.Y. 1962).

In light of the court's decision that plaintiff's breach of warranty voids the insurance contract under which he sues, there is no need to reach the question of whether plaintiff's failure to file a proof of loss, as required by the policy, likewise requires the granting of summary judgment. The court notes, however, that the insured is a sophisticated jewelry merchant who has had prior experience with jewelers block insurance policies. His case is therefore distinguishable from cases involving automobile liability policies affected with a public interest in protecting against injury an innocent, unsophisticated public. Plaintiff argues that once an insurer issues a general denial of liability without basing the denial on a specific breach of condition precedent by the insured, the company is estopped from asserting that condition as a defense. In this case, however, the defendant insurance company never made a general denial of liability within the 60 day period allowed for filing of proof of loss.

For the reasons stated the defendant is granted summary judgment and the complaint is dismissed.

Defendant is directed to refund to the plaintiff the premium paid.

Submit order and judgment accordingly.

SO ORDERED.

Dated: New York, New York  
June 30, 1975

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U. S. D. J.

ORDER APPEALED FROM (FILED July 14, 1975)

USDC

105a

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

FILED

7-14-75

SDNY

MURRAY GLADSTONE,

:

Plaintiff, : ORDER AND JUDGMENT

-against- : Civil Action No.  
72 Civ. 794

FIREMEN'S FUND INSURANCE COMPANY, : (HFW)

Defendant. :

-x

This cause having come on to be heard on motion of the defendant, Fireman's Fund Insurance Company, for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having considered the pleadings in the action, the Notice of Motion dated May 27, 1975, and the affidavit of James M. Hughes, duly sworn to the 22nd day of May, 1975, and exhibits thereto annexed, the affidavit of Robert J. Forrester duly sworn to the 27th day of May, 1975, the reply affidavit of James M. Hughes, duly sworn to the 18th day of June, 1975, the defendant's interrogatories and supplemental interrogatories propounded to plaintiff, with due proof of service thereof, and upon the plaintiff's sworn answers to said interrogatories and supplemental interrogatories, the sworn depositions of the defendant and its employees, and also the sworn depositions of the plaintiff and his agent, and the Statement under Rule 9(G) of the General Rules of this Court, all in support of said motion, and the affidavit of Murray Gladstone duly sworn to the 10th day of June, 1975, the affidavit of Joan Sciarretta duly sworn to the 10th day of June, 1975, and the affidavit of Leo M. Laurance duly sworn to the 10th day of June, 1975, in opposition thereto, and having heard

Bigham Englar Jones & Houston (James M. Hughes, of counsel), the attorneys for the defendant, in support of said motion, and Leo M. Laurance, Esq., the attorney for the plaintiff, in opposition thereto, and having found that there is no genuine issue of fact to be submitted to the trial court with respect to the affirmative defenses upon which the said motion for summary judgment is predicated, and having concluded that defendant is entitled to judgment as a matter of law, and upon the memorandum decision (#42722) of this Court, it is hereby

ORDERED that defendant's motion for summary judgment is in all respects granted; and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiff's action be dismissed on the merits, and that defendant recover its costs from the plaintiff; and it is further

ORDERED, ADJUDGED AND DECREED that the defendant refund to the plaintiff the premium paid by plaintiff on the Jeweler's Block policy herein.

Dated: NY NY  
7-11-75

~~Entered~~

S/NF Walker

JUDGMENT ENTERED: 1/15/75

Ryann D Bingham  
CLERK

## NOTICE OF APPEAL (Filed July 24, 1975)

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

MURRAY GLADSTONE,

Plaintiff,

-against-

FIREMEN'S FUND INSURANCE COMPANY,

Defendant.

NOTICE OF APPEAL

Civil Action No.  
72 Civ. 794  
(HFW)

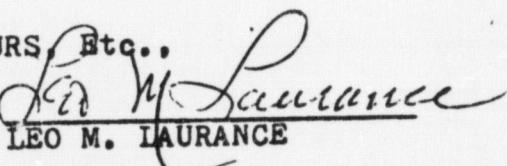
SIRS:

Notice is hereby given that MURRAY GLADSTONE, hereby appeals to the United States Court of Appeals for the Second Circuit from the order granting Defendant's motion for a summary judgment and dismissing the Plaintiff's action on the merits and from the final judgment in all respects, herein entered on the 15th day of July, 1975.

Dated: New York, New York  
July 22, 1975

YOURS, Etc.,

BY,

  
LEO M. LAURANCE

LEO M. LAURANCE  
Attorney for Plaintiff  
299 Broadway  
New York, NY 10017  
212-267-7426

TO: Bigham, Englar, Jones &  
Houston  
Attorneys for Defendant

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

MURRAY GLADSTONE,

Plaintiff-Appellant,

against

FIREMANS FUND INSURANCE CO.,

Defendant-Appellee.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

James A. Steele

being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at  
310 W. 146th St., New York, N.Y.

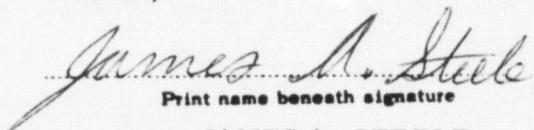
That on the 1st day of October 1975 at 99 John Street, N.Y., N.Y.

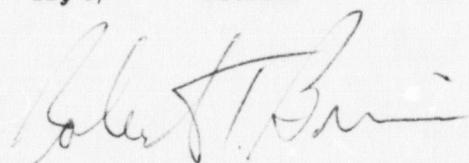
deponent served the annexed *copy of L.P.*

upon

Bingham Englar Jones &amp; Houston

the Attorneys in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,

Sworn to before me, this 1st  
day of October 1975
  
 Print name beneath signature  
 JAMES A. STEELE



 ROBERT T. BRIN  
 NOTARY PUBLIC, State of New York  
 No. 31-0418950  
 Qualified in New York County  
 Commission Expires March 30, 1978